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A

TREATISE

ON THE

LAW OF WAYS,

INCLUDING

HIGHWAYS,

TURNPIKE ROADS AND TOLLS,

PRIVATE RIGHTS OF WAY, BRIDGES, AND FERRIES.

"There are four kinds of Ways: 1. A Footway. 2. A Horseway, which includes a Footway. 3. A Carriageway, which includes both Horseway and Footway. 4. A Driftway."—Selwyn's N. P. 1339 *.

"The erecting of a BRIDGE is but laying out a way."—3 Mod. 294.

A FERRY "is a common passage, which is no more than a common highway."—3 Mod. 294.

---

* This enumeration, although written to illustrate private ways, is, nevertheless, equally applicable to highways.

BY

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(AUTHOR OF THE "LAW OF RIGHTS OF COMMON.")

LONDON:

SAUNDERS AND BENNING, LAW BOOKSELLERS,

(SUCCESSORS TO J. BUTTERWORTH AND SON,)

43, FLEET STREET.

1829.

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1829

G. WOODFALL, ANGEL COURT, SKINNER STREET, LONDON.

RJF 16 Oct 53

THIS WORK

IS RESPECTFULLY INSCRIBED

TO

EMMOTT SKIDMORE,

WHO,

FOR THIRTY SIX YEARS,

BOTH IN HIS OFFICE OF SURVEYOR, AS WELL AS BY DISINTERESTED PRIVATE EXERTIONS,

HAS CONSIDERABLY IMPROVED

THE ROADS

IN THE NEIGHBOURHOOD OF RICKMERSWORTH.

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PREFACE.

In the following Volume the various kinds of Ways are first mentioned. The methods of claiming them are next considered, together with the lawful user of them, as with so many horses, &c. There are several obstructions upon roads which are occasionally great inconveniences to passengers. These, with the remedies, either prescribed by the legislature, or enforced by private individuals, are next presented to the notice of the reader. Some circumstances will be found which operate to destroy a public highway, and others which defeat a private right of passage. A Chapter on extinguishment is devoted to the consideration of these. The sixth and seventh Chapters are devoted to the important subject of the due management and improvement of roads, in the course of which the different liabilities to repair, the diversion and turning of roads, together with the law of turnpike tolls, are discussed at length.

The law of Bridges is next introduced; and the respective liabilities to repair, together with the proper course to be pursued when it is desirable to alter or widen Bridges, are mentioned.

The work concludes with three Chapters on Pleadings, Evidence, and Costs, as they respect Indictments or Actions touching Ways.

By the word "Ways," of course both public and private rights of that nature are understood, for, technically speaking, a right of way is a liberty for a particular person or particular individuals to use a certain road, to the exclusion of other persons.

With reference to Acts of Parliament for the regulation of roads, it is to be observed, that all the *general* statutes in force upon that subject will be found in the ensuing work, but that

the local acts could not of necessity be included, by reason of their infinite diversity.

This will account for the omission of the late Metropolitan Act, which is, in effect, no more than a local act. It may be had, like other local enactments, in a separate form, and must be expounded according to the same construction which governs the general law upon the question.

The Author has purposely avoided even the setting out of these *general* statutes at length, for to have done so would not only have swelled this Treatise far beyond its present size, but, inasmuch as every wise practitioner would consult the acts themselves upon the discussion of any question, it seems, moreover, to be unnecessary.

1, Cloisters, Temple,
June 1829.

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A TREATISE,

ETC.

CHAPTER I.

Of the several kinds of Ways, and of the Ownership of the Soil, Trees, &c. therein.

Division of Ways.

WAYS have been commonly divided into three classes, but a late decision will warrant us in calling them fourfold (*a*). 1. Footways*. 2. Footways and Horseways. 3. Foot, Horse, and Carriage Ways, &c. 4. Drift Ways (*b*). Lord Coke says, that the second class is also called a packe and prime way, because it is both a footway, which was the first or prime way, and a packe or drift way also (*c*); but we shall see presently that a right of horse way does not necessarily include a way for driving loose cattle. The third division is said to include the other two (*d*), and although this may generally be the case, and is, indeed, *primâ facie* evidence that it is so, it has been held, that a right of way for carriages does not necessarily establish a claim for a drift way. The plaintiff pleaded, in bar to an avowry damage feasant, that he had a right of way for his cattle from a public street along a yard to certain premises in his occupation which he made use of as a slaughter-house. The preceding occupier had been accustomed to drive fat hogs along the way, and the plaintiff had been lately in the habit of driving fat oxen there for the purpose of killing them. It was admitted by the de-

(*a*) 1 Taunt. 279. Selw. N. P. 1339.

* Where a private Act of Parliament empowered a water company to "break up the soil and pavement of roads, highways, *footways*," &c., "and public places;" it was holden that the word "footway" as there used, meant those footways in large towns which are too narrow to admit of carriages and horses, and not a path over a private ground. 4 Bing. 448. Scales v. Pickering.

(*b*) Co. Litt. 56 a.

(*c*) Ibid.

(*d*) Ibid.

fendant, that all manner of carriages might pass and repass, but no other user for cattle than that mentioned above was proved. After a verdict against the enlarged right sought by the plaintiff, the Court, upon a motion for a new trial, refused to disturb the decision of the jury. They thought there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle; that it might be dangerous to allow such an user in a closely inhabited neighbourhood, and that a public notice, however necessary in a public, was not necessary in a private way*. They also considered it a question for the jury to find, whether a right of way for cattle should be presumed from evidence of a cart-way (*a*).

Ways threefold.

Ways may also be considered as threefold under the description of: 1. The king's highway. 2. A common way, such as leads from a village into fields, &c. (*b*) 3. Private ways. Private ways are distinguishable from common ways, inasmuch as the soil of the former is generally in the owner of the adjacent land; whereas the soil of the common way is either in the lord of the manor, or belongs to the respective proprietors of land on each side of the road. And when we speak of a *right of way*; strictly taken, it means a private way, that is, the privilege which an individual, or a particular description of persons, such as the inhabitants of the village of *A.*, or the owners or occupiers of the village of *B.*, may have of going over another person's grounds (*c*). It is an incorporeal hereditament, in which a particular man has an interest and a right, though another be the owner of the land where it is claimed (*d*).

It may be further observed that these two general divisions of ways are not by any means incompatible with each other. For a foot, a horse, or a cart way, may be used as the king's highway, as a common, or as a private way, according to the right in each particular case; although it was contended, on one occasion, that the existence of a highway was not proved by evidence of a common footway only. The pleadings in case had described the *terminus ad quem* as a public king's highway, but, at the trial, proof of a footway and bridleway being given, without more, it was urged that a public highway was *nomen generalissimum*, and must be taken to be such for all purposes. The objection being overruled, application was made for a new trial; but the Court held the proof sufficient, for here was a public highway for foot passengers (*e*). And Lord Ellenborough ex-

* As to the notice, by Mansfield, Chief Justice, against Chambré, J.

(*a*) 1 Taunt. 279. Ballard v. Dyson.

(*b*) 6 E. 3. 23.

(*c*) 3 Cru. Dig. 109.

(*d*) 2 Bl. Com. 35.

(*e*) 8 East, 4. Allen v. Ormond. The court said, however, that such a

pressed the same opinion some years afterwards, saying: "There is no doubt that a public footway or bridleway is a highway: it is a highway for foot passengers, or for horse passengers," &c. (*a*)

But it has not been expressly decided, whether every highway must necessarily be a thoroughfare. In the case, indeed, of the trustees of the Rugby Charity against Merryweather (*b*), there was evidence of user of a common street, though it was said to be no thoroughfare; and Lord Kenyon seemed to admit the distinction. But the authority of that case has been questioned generally, although the decision did not take place on the point of thoroughfare. And on a subsequent occasion Lord Chief Justice Abbott said, "I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it." (*c*) The learned lord, however, added, that he had told the jury at *nisi prius*, that such a highway might exist (*d*). Lord Ellenborough had instanced Queen Square as a highway in a former case, and "yet", said the learned chief justice, "there is no thoroughfare." * Thoroughfare.

If there be a distinction in law between a highway and a thoroughfare, the term "king's highway" will be capable of two divisions, and there would then be five, instead of four, kinds of ways.

Private ways may also be said to be appendant, or in gross; but the consideration of them in this sense rather belongs to the mode of claiming them, which will be the subject of the ensuing Chapter. Ways appendant or in gross.

The king's highway is a public passage for the king and his subjects, and thence the name is derived. Whether the highway lead directly to a market town, or only from town to town, being a thoroughfare to other towns, it is still a king's highway, if it be common to all the people (*e*). So, again, if a way lead What is the king's highway.

description might be bad on special demurrer, as not pointing out, with sufficient certainty, what sort of highway was meant. See Ca. Temp. Hardw. 315. Rex v. Hatfield Inhabitants. Lord Chief Justice Holt, speaking of a footway, horse and prime way, common to all the queen's subjects, expressed himself in terms which can hardly be reconciled with this decision. "These are *not* altæ regiæ viæ, for that is the great highway, common to cart, horse, and foot, that please to use it." 6 Mod. 255.

(*a*) 13 East, 97. So Holroyd, J. 2 B. & A. 648. The same of a towing path. Ib. By Bayley, J.

(*b*) 11 East, 375, note.

(*c*) 5 B. and A. 456.

(*d*) Ibid. A highway is infinite; it has no terminus à quo, nor terminus ad quem. 10 Mod. 383, by Parker, C. J.

* There is a thoroughfare for foot passengers at one part of Queen Square.

(*e*) 1 Hawk. c. 76. sect. 1.

to a market, and be a way for all travellers, and communicate with a great road, &c. it is a highway (*a*). But it is not essential that a highway should lead to a market town, for then the lord of a market might extinguish a highway by forfeiting or surrendering his charter, or the king, by granting a market, might change a private into a public way (*b*). It follows from hence that a road, which is for the benefit of some particular persons only, cannot be called a highway.

Again, if a vill be erected, and a way laid out to it, if there be no other way but that to the vill, it shall be deemed a public way (*c*), though not a *king's* highway, unless common to all persons.

Outlets, if used time out of mind, (when the road, for example, is overflowed,) form part of the highway, so that the king's subjects may go upon corn sown on such outlets if the track be foundrous, or out of repair (*d*).

Turnpike roads.

Turnpike roads are highways; but it does not necessarily follow, that every road is a highway where toll is taken, since there may be toll-traverse for passing over a manor, &c., as we shall see in a future page (*e*).

Water.

A navigable river is also esteemed to be a highway (*f*). And if a water, which is a highway, change its course, and flow upon the land of another, the highway extends over the place where the water newly runs, in like manner as it existed over the

(*a*) 1 Ventr. 189. per Hale, C. J.

(*b*) Burn's Justice, 23d edition, vol. 2, p. 667.

(*c*) 10 Mod. 150, per Parker, C. J.

(*d*) 1 Ro. Ab. 390. Sir Edward Duncombe's case. Formerly, if the track were foundrous, and one assigned a way out of his own ground, it did not become the king's highway, without a writ of ad quod damnum and inquisition thereon. Cro. Car. 266.

By 8 and 9. W. 3. c. 16, upon the enclosure of a common highway after an ad quod damnum and inquisition thereon, any person may complain by appeal to the sessions next after the inquisition. The determination of the sessions to be final; and if no appeal be made, the inquisition and return, entered and recorded by the clerk of the peace, shall be for ever binding.

This writ of ad quod damnum is an original writ, issuing out of and returnable into Chancery, and directed to the sheriff to inquire of the damage likely to arise, and the inquisition, being a proceeding *ex parte*, is in its return traversable. Burn's Justice, ed. 23, vol. ii. p. 699. The public could not justify going over a new way, *as a common highway*, without this writ, but were obliged to shew their excuse specially. The inhabitants were not bound to keep watch in such new way, nor repair it, nor make amends for a robbery committed on it. Cro. Car. 267. 1 Burr. 465. See Vaugh. 341. It was (and in such cases still is) necessary, that the new way should be as beneficial as the old one. Ambl. 295, Armitage, *ex parte*. It was made a question, in the case just cited, whether this writ would lie to change the *condition* of a way.—Ibid.

(*e*) Ch. VII.

(*f*) 10 Mod. 382, per Parker, C. J.

ancient course, so that the lord of the soil may not disturb it (*a*).

Bridges.

Further, a public bridge is comprehended under the title of a king's highway (*b*).

To whom the soil and profits of the highway belong.

It is laid down in the old books, that in a highway the king has nothing except the passage for himself and his people, but that the freehold, and all the profits, as trees, &c. appertain to the lord of the soil (*c*). And, it is further mentioned, that the lord of the soil in this case is the owner of the adjoining land (*d*). For it is presumed by the law, that the proprietor of such land adjoining gave up to the public for passage at some former period all the land between his inclosure and the middle of the road (*e*). Hence it is, that trespass may be maintained by such a proprietor for digging the ground of the highway (*f*), and he may, moreover, maintain ejectment, for the sheriff may give possession of the way, subject, nevertheless, to the easement (*g*). Trespass was brought by the plaintiff, who had built a street upon his property, and permitted it to be used as a highway. It was objected, that the plaintiff had dedicated the place to the public, and was incompetent to sue as for a trespass on his private property. But the court said, that although there had been a dedication to the public, as far as regarded a right of passage, a transfer of the absolute property in the soil had never taken place; and the plaintiff had judgement (*h*).

Primâ facie, therefore, the presumption is, that a strip of land, lying between a highway and the adjoining close belongs to the owner of the close, as is the presumption also, that the highway itself, *ad medium filum viæ*, does (*i*), although acts of ownership exercised by the lord may be adduced to repel it (*k*). And where that strip of land communicated with open commons, the presumption failed, for the evidence of ownership which applied to the larger portions of land, applied to the narrow strip also to which they were contiguous (*l*). So, where the land next to the road was a slip of green sward, which had been generally treated

(*a*) 22 Ass., pl. 93.
(*b*) See post. Ch. VIII. on Bridges.
(*c*) 2 E. 4. 9. 8 E. 4. 9. 8 H. 7. 5. 2 Inst. 705.
(*d*) 8 H. 7. 5.
(*e*) 7 B. & C. 306, per Bayley, J.
(*f*) 8 E. 4. 9. 1 Burr. 143, by Lord Mansfield.
(*g*) 1 Burr. 133, Goodtitle, dem. Chester, v. Alker. Id. 143, Selman v. Courtney, cited there.
(*h*) 2 Str. 1004, Lade v. Shepherd.
(*i*) 7 Taunt. 41, by Gibbs, C. J. 2 Stark. 468, by Abbott, C. J. 7 B. & C. 306, by Bayley, J. 2 Stark. 463, Steel v. Prickett. 11 East, 51, Stevens v. Whistler. And see 3 B. & P. 413, Doe d. Jackson v. Wilkinson.
(*k*) Lofft. 358. Anon. As to taking gravel, &c. see Serjeant Hill's MSS. vol. 10, pp. 351. 442, Sir Thos. Salisbury v. Rhodes.
(*l*) 7 Taunt. 39, Grose v. West.

as waste land, and as a common for cattle, being considered as a portion of a neighbouring common, to which on one extremity it adjoined; in this case, in the absence of any evidence that the owner of the soil next the road had exercised any right over it, the judge directed the jury to presume the *locus in quo* to be common land, for the *primâ facie* presumption failed by reason of the reputation of waste (*a*). But where a cottage had been built on a slip of waste land by the side of a turnpike road adjoining to inclosed land, which was *copyhold*, and ejectment was brought by the owner of the inclosure to recover this cottage; it was objected, that however true it might be, that the presumption of ownership in the proprietor of adjacent land took effect where that proprietor was a freeholder, it could not avail on the present occasion, as the adjoining premises were copyhold; and it was contended, that this cottage belonged to the lord of the manor. But the court gave their judgement for the plaintiff; had the road existed, indeed, from time immemorial, the property in the road and waste adjoining might have belonged to the lord; but here the probability was, that the road had been made long since. It was added, that the *primâ facie* presumption ought to be constant and uniform, and that it should extend to cases where the owner is a leaseholder or copyholder, as well as a freeholder (*b*).

In a case recently quoted (*c*), Lord Mansfield, after observing that the freehold of the way, and all the profits belong to the owner of the soil, went on thus: "So do all the trees upon it, and mines under it (which may be extremely valuable). The owner may carry water, in pipes, under it." (*d*) With respect to trees, there seems, at first sight, to be some difficulty, owing to an apparent contrariety of opinions in our books. On the one hand, it would appear from the authorities, that trees growing in

(*a*) Holt 463, Headlam v. Hedley.

(*b*) 7 B. & C. 304, Doe, dem. Pring and another, v. Pearsey. "In remote and ancient times, when roads were frequently made through uninclosed lands, and when the same labour and expence was not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law, that the public, when the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence, that, although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the *onus* of repairing the road. If the same person was the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure on one side, and the owner of the lands inclosed on the other, he was bound to repair the whole. Hence it followed, as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads." 2 Stark. 469, by Abbott, C. J.

(*c*) Goodtitle v. Alker.

(*d*) 1 Burr. 143.

the highway, or on one side of it, are the property of the lord of the manor; on the other hand, that they belong to the owner of the adjacent land, whether he be lord or freeholder. Thus it is said, that if trees be growing in the king's highway, he to whom the seignory of the leet of the same place belongs, shall have the trees (*a*). Brooke, however, says, that the word "leet" here must mean the fee, or the soil, for that leet is not seignory; that, if not so taken, the case cannot be law; but he adds, that leet is in some countries taken for the soil (*b*). So again, it is said, that all the profits of the highway, as trees, &c., belong to the lord of the soil (*c*). The comment of Kitchin, in his Courts Leet, upon these passages, is as follows: "Where a lord of a manor hath land upon both parts of a highway, he shall have the trees growing in the highway; and, also, where a way is over a waste of the lord's; but, where a freeholder hath land of each part of the highway, he shall have no trees growing in the highway; and where he hath land joyning but upon one part of the way, he shall have no trees growing upon that half of the way. But Britton saith, that a freeholder shall have trees, if it be not in the common highway." (*d*)

This observation of Britton is an authority against the right of the lord to take the trees, unless they actually be in the highway. It is, moreover, laid down in Rolle (*e*), that the owner of the soil of both sides the way shall generally have the trees growing upon the way. And further, it is noted in Brownlow, that to the owner of the soil on both sides of the way, of common right belong the trees that grow in the lane, whether he be lord or freeholder (*f*). These remarkable words are added:—*The best badge of truth, is the usage of taking the profit of the trees* (*g*). So that it would appear from thence, that the question would rather be decided by the custom of each particular manor. And, in conformity with this rule, it has been held, that the lord of a rape, within which were ten hundreds, might prescribe to have all the trees growing in any highway within the rape, although the manor or soil should belong to another, and usage to take the trees was said to be a good badge of ownership (*h*).

It is observable, that the authorities, upon which Kitchin founds his opinion, speak of the *lord of the soil*. But it by no means follows, that the lord of the soil is the lord of the manor,

(*a*) 27 H. 6. 8.
(*b*) Bro. Ab. Leete. pl. 3.
(*c*) 8 E. 4. 9. and see 6 E. 3. 23.
(*d*) Kitchin, p. 68.
(*e*) 1 Ro. Ab. 392.
(*f*) 1 Brownl. 42.
(*g*) Ibid.
(*h*) 1 Ro. Ab. 392. Pelham v. Wiatt.

for the presumption being, that the highway, *usque ad medium filum viæ,* belongs to the owner or owners of the adjacent land respectively, the lord of the soil might there mean the freeholder, whose land lay contiguous.

It would be desirable to reconcile the expressions above quoted, which are thus apparently at variance with each other. First, it is clear, according to the very late case in Barnewall and Cresswell, that the highway, *ad medium filum,* is *primâ facie* the property of the adjoining land proprietors, whether copyholders, leaseholders, or freeholders. And the reason given is, that the proprietor gives up all the land between his inclosure and the middle of the road to the public for passage. Trees, therefore, growing upon the way, could not be the property of the lord of the manor under these circumstances, at least so far as relates to the first presumption entertained upon the subject. And as the court declared, in the above case, that they would not presume a road to have been made before the time of legal memory, it would be considered, that a road had been made within such time, and consequently that the lord had not originally reserved either the soil or the profits, including the trees. The original presumption, consequently, stands unimpeached, liable to be answered, nevertheless, by evidence of a contrary description. So that, where it appears, that the lord of the manor has always exercised the right of taking the profits of the trees, or, possibly, the timber itself, this may be a sufficient answer to the presumption, and a fair ground for concluding, that the trees were excepted out of the original grant. Thus it is, that the taking of the profits is said to be the best badge of ownership. So that it seems the cases may be well reconciled, by setting up the presumption of ownership in the adjoining proprietors in the first instance, subject to be defeated by a prescription, or well-founded custom, on the part of the lord of the manor.

CHAPTER II.

How Ways may be claimed.

With respect to a highway, in the words of Hale, C. J., "much depends upon common reputation." (*a*) And if the owner of land permit the public to pass and repass over his soil without molestation, or any assertion of his rights, for some time, the law will presume a dedication of the way to general use. Much discussion has arisen as to the period which must elapse before such a dedication will be presumed; and the attention of the reader will be presently directed to it. It seems, therefore, that a highway may be claimed, first, from time immemorial, and next, by reason of such a sufferance of public user within time of memory, as will lead to the conclusion, that the original proprietor had designed a common benefit for all the king's subjects. It may also be enjoyed under an express grant. The same principle appears to be applicable to common ways.

Ways how claimed.

There are five modes of establishing a title to private ways: 1. By prescription. 2. By grant. 3. For necessity*. 4. By custom. And lastly, ways, whether public or private, may be claimed by virtue of acts of parliament, as inclosure acts, &c. (*b*) We will first consider the claim to the highway.

If evidence be adduced to show, that a particular road has always been used as a public way, and always considered as such, it seems, that a claim of highway will be made out. And ways are now so well defined, from town to town, and village to village, and so well established by reputation, that a complaint of the want of thoroughfare is not likely to arise at the present day. Whence it is, that the writ, *ad quod damnum*, which might formerly have been resorted to for the purpose of ascertaining whether any injury would be likely to arise from the grant of a free passage for the king and his people, is, for the most part, fallen into disuse in this respect (*c*).

Highway how claimed.

(*a*) 1 Ventr. 189.

* This right is said to arise from a grant by the owner of the soil, or from a prescription which supposes a grant, or from the operation of law. 6 Mod. 3. See Finch's Law, p. 63.

(*b*) 8 Price, 535, Sutcliffe v. Greenwood. Justices at sessions may also make alterations in the line of roads. And the power of reserving *waggon ways* is occasionally reserved to the lord of the manor by inclosure acts. See 1 B. & C. 195.

(*c*) See as to the ad quod damnum, Cro. Car. 267, and ante, p. 4.

Dedication of ways to the public.

But the principal question which has been agitated of late, on the subject of public roads, is the presumption of *dedication* to common use by the proprietors of land, and, especially, by the owners of new streets. And there has been some difference of opinion, and even a contrariety of decisions, as to the proof of a dedication. It seems, however, to be agreed, on the one hand, that if a bar, or a written notice of "no thoroughfare," &c. be constantly kept up, the intention of the owner to exclude the public will be sufficiently clear; and, on the other hand, that long user of a way without any obstacle, at a time when the owner of the soil is in possession, and cognizant of the user, will afford the strongest presumption of a dedication. We will now advert to the cases. Upon the prosecutor of an information showing, that there had been a common passage under the defendant's house, as far back as any witnesses could remember, the defendant produced a lease of the way for fifty-six years, to the intent that it might be a passage during the term, and it appeared that the term had elapsed. The way had, nevertheless, been left open for four years, but the Chief Justice said, that would not be long enough to amount to a gift of it to the public (*a*).

Again the plaintiffs brought an action against the Governors of the Foundling Hospital, for removing an obstruction in Lamb's Conduit-street. They pleaded a common highway, &c. It was proved, that the *locus in quo* had been a public street for above fifty years. A bar had been put up for two years previous to the action, and the plaintiffs accounted for this, by saying, that the premises had been on lease for a long term, till ten years before the action, so that the public had been permitted to use the way for eight years without disturbance. Lord Kenyon asked, what the plaintiffs could say to this sufferance for eight years, and they replied, that there had been a treaty pending between them and the Foundling Hospital, which had at length been broken off. Lord Kenyon held, that after permitting the public to use the way for eight years, without offering any impediment, it was too late to assert the right, and that it was a sufficient time for presuming a dereliction of the way to the public. The Chief Justice added, that six years had been held sufficient in a great case much contested; and a verdict was found for the defendants, upon the issue, on the common highway (*b*). This case, however, has been very much questioned; and Lord Chief Justice Mansfield, in a subsequent case, observed upon the length of time, as mentioned by Lord Kenyon, very strongly. He said, he never could discover in the Foundling Hospital case when the dedication began:—if six years would be sufficient, "why not one? why not half a year? It would then become necessary for every reversioner, coming into possession of his estate, after a lease, instantly to put up fences

(*a*) 2 Str. 909, Rex v. Hudson.
(*b*) 11 East, 375. n. Trustees of the Rugby Charity v. Merryweather.

all round his property, to prevent dedication." (*a*) The plaintiff had erected a street, leading out of a highway, across his own close and terminating at the edge of the defendant's close adjoining. The defendant's close had been separated from the end of the street for twenty-one years, by his own fence, and during nineteen out of the twenty-one, the houses had been completed, the street watched, cleansed, and lighted, and part of the paving done at the expense of the inhabitants. The defendant then pulled down his fence which separated his land from the street, and the plaintiffs upon this erected a wall upon their own ground, which the defendant prostrated, whereupon the action was brought. The question was, whether this *cul de sac* was a thoroughfare; and the court held, that the defendant was not justified in pulling down his fence, and that the plaintiffs had not dedicated their street to the public (*b*). Mansfield, C. J., observed, that there were many conveniences attending a private *cul de sac*, of which the lessors had no right to deprive their tenants without their assent. And he doubted, whether the landlords could agree to the dedication, unless their tenants were willing to concur (*c*). Mr. J. Chambré differed from the rest of the court: he said, that a street had been laid down to be a highway, that no particular time was necessary for evidence of a dedication, and that great inconveniences would arise from attaching a private right of way only to the houses in a *cul de sac* (*d*). It was said, however, that if the defendant had originally intimated his intention of pulling down his fence, and inclosing a thoroughfare, it would then have been incumbent on the plaintiffs to have placed an impediment, without delay, to prevent the public right from attaching; but no such notice had been given (*e*). The case in East was further observed upon by Mr. J. Holroyd, on another occasion, who considered it as somewhat shaken by the observation of Lord Chief Justice Mansfield (*f*). It is therefore rather the intention of the owner, than the time of sufferance, which must determine the fact of dedication. For example, the Duke of Bedford preserves his right in Southampton Street, Covent Garden, by a bar set across the street, which is shut at pleasure, and shows the limited right of the public (*g*).

Where a bar had been placed across a newly-finished street, which bar, however, was soon knocked down, and the public used the street for some years as a thoroughfare, it was contended, that a dedication, at least as far as a right of foot-path, had been

(*a*) 5 Taunt. 142.
(*b*) 5 Taunt. 126, Woodyer v. Hadden.
(*c*) 5 Taunt. 143. See on this subject, 5 B. & A. 456, observations of Abbott, C. J.
(*d*) 5 Taunt. 137.
(*e*) 5 Taunt. 142, by Mansfield, C. J.
(*f*) 5 B. & A. 457.
(*g*) 11 East, 376, note, by Lord Kenyon.

proved. Mr. Justice Heath held, that the putting up of the bar rebutted the presumption of a dedication to the public; that the dedication contended for must have been made openly, and with a deliberate purpose. The verdict negatived the right of way (*a*). So again, where it appeared that a gate had been once erected across the *locus in quo*, but, that for twelve years the public had used a way over the *locus in quo*, there being no gate during that period, Mr. Serjeant Marshall directed the jury to find against the right of way, and the Court of King's Bench sustained his opinion (*b*). Again, where commissioners, under a local act, set out a road for the use of particular persons only, but the public, in fact, used it for many years without interruption as a carriage-way, this was held insufficient to presume a dedication. It was a distinguishing feature in this case, that the owner of the soil was compellable to permit a qualified passage; and it would be most inconvenient, if, wherever an occupation road should be set out, it should become almost immediately a public road, because it might happen to be convenient for passage (*c*).

On the other hand, where a passage leading from one to another part of a street (although by a most circuitous route) had been open to the public for several years, without either a bar or chain across it, or any mark denoting private property, and had been lighted by the City of London for a considerable time, Lord Ellenborough expressed his expectation at the trial for obstructing this way, that habitual interruption offered to persons attempting to pass through, would be shown in evidence. No such testimony being adduced, the Lord Chief Justice declared his opinion, that this was a public road, and a verdict of guilty was given against the defendant (*d*).

However, even admitting that a considerable lapse of time might establish a thoroughfare or public way, admitting there may be a highway which need not be a thoroughfare, still it is requisite that the dedication should be the act of the owner of the fee. Therefore, where it appeared that the *locus in quo* (Little Abingdon Street) had been used by the public as far back as living memory could go; that it had been lighted, paved, and watched, under an act of parliament (11 Geo. 3.), and enumerated therein amongst the streets of Westminster; but it also turned out, that the place in question *had been on lease from* 1719 *to* 1818, and that the plaintiff put up a fence in 1820; the court were quite clear, that a consent on the part of the owner of the fee was indispensable towards a public right of way, and that if leave be given by an individual having a limited right, (as

(*a*) 1 Campb. 262, note, Roberts v. Karr.
(*b*) 1 Campb. 263, note, Lethbridge v. Winter.
(*c*) 4 B. & A. 447, Rex v. Inhabitants of St. Benedict.
(*d*) 1 Campb. 260, Rex v. Lloyd.

under a lease for ninety-nine years,) the licence can only continue for a limited period. The Chief Justice had left it to the jury to say, whether there had been any dedication prior to 1719; which they negatived by their verdict (*a*).

But where there had been a frequent change of tenants, coupled with a long, notorious, and uninterrupted sufferance, to which the landlord's steward was privy, Lord Ellenborough presumed the concurrence of the landlord, although it was urged that the acquiescence of successive tenants could not bind the reversioner, and there was no proof that the landlord had ever been in possession (*b*). Here, it is obvious, that the landlord had several opportunities of prohibiting the public passage, which he neglected, and notice to the steward was notice to the landlord.

Upon a late dispute whether a street had been dedicated, Lord Chief Justice Best directed the jury, that if they thought the street had been used for years as a public thoroughfare, with the assent of the owners of the soil, they might presume a dedication, and the court refused a motion for a new trial. The verdict was in favour of the general right (*c*).

Partial dedication.

We come now to the question, whether there may be a partial dedication; and this point has not been expressly decided, although it has been frequently mentioned by the judges, whose opinions, however, by no means agree upon the subject. That the permission, or dedication, may be definite as to *time*, seems, however, not to be denied; it was so laid down by Lord Ellenborough at the same time that he declared the necessity of an absolute dedication of the way itself (*d*). And Mr. Justice Heath, when denying the existence of a partial dedication, observed, that there might be a *grant* of a footway only (*e*). Both these judges were of opinion, that there could not be a partial right as acquired by dedication. But the matter was very lately observed upon again, and though not determined, Mr. Justice Bayley said, he was disposed to think there might be such a dedication, and Mr. Justice Holroyd said, that on principle he saw no objection to it (*f*). It was in a case where the land-owner had permitted the public to use a road for several years, for every purpose except that of carrying coals. But it was said, that having made a road public for horses and carts, the owner could not exclude any carts. It appeared, that the road had been made in 1820, and that a year afterwards, the owner caused two posts

(*a*) 5 B. & A. 454, Wood v. Veal. 4 B. & C. 591, Harper v. Charlesworth. S. P.
(*b*) 4 Campb. 16, Rex v. Barr.
(*c*) 3 Bing. 447, Jarvis v. Dean.
(*d*) 2 M. & S. 263.
(*e*) 1 Campb. 263, note.
(*f*) 7 B. & C. 260. Littledale, J. doubted.

to be erected, one at each side of the road running through his estate, and to one of these a chain was attached. The judge, at the trial, told the jury, that a dedication to the public for a year was a dedication in the eye of the law, and the question for the Court of King's Bench, was, whether there had been a dedication upon this occasion. And it was the opinion of the court, that the public must take *secundum formam doni*, and it was impossible to conceive that the owner ever intended to give the road as a way for coals. There could not, therefore, have been a general dedication of the road. As to a partial dedication, admitting that a restriction as to a public way might exist, two judges* were of opinion, that there had been such a partial dedication in the instance before them. But if no such restriction could be supported, then, by Mr. Justice Holroyd, "this grant was only a licence revocable." And, at all events, as the right given could not be more extensive than the gift imported, and as the evidence of that gift absolutely negatived the general dedication, a verdict was entered in favour of the owner, the plaintiff in trespass (*a*).

But if a general grant be once made, the grantor can never resume his rights again to the hindrance of the public. And the highway cannot be changed or diverted without the King's licence or the authority of parliament (*b*). And even if it have not been used, no length of time will be sufficient to prevent the King's subjects from using the way again, if they think proper†.

Common ways.

Common ways, such as lead from a village into fields, &c., may also be claimed by reputation, or from time immemorial.

They may also be demanded, in some cases, as ways of necessity, as for instance, if there should be but one road to a place, and so no other way of going (*c*).

Private ways claimed. 1. By Prescription.

A right of way, strictly so called, may be claimed, first, by prescription and immemorial usage. As to have a way from one's meadow into the high street (*d*), from one's house to church (*e*), out of a church, or over a church yard (*f*), over a particular close or field to a parish church, which latter may be a prescription by the inhabitants of a vill (*g*). The church-yard of the Char-

* Bayley and Holroyd, Justices.

(*a*) 7 B. & C. 257, Marquis of Stafford v. Coyney. But supposing that there must be an absolute dedication to the public, still it may be definite as to the time. 2 M. & S. 263. By Lord Ellenborough.

(*b*) Cro. Car. 266. 1 And. 234.

† Said to be the opinion of Gibbs, J. Selwyn. N. P. 1310.

(*c*) Willes, 71, Chichester v. Lethbridge.

(*d*) 20 Ass. pl. 18. 20 E. 3. 18.

(*e*) 20 Ass. pl. 18. 4 Mod. 366. 1 Ro. Ab. 391.

(*f*) 18 E. 4. 8. pl. 10, "out of a church" here means "through the church." Bro. Prescr. pl. 91.

(*g*) See 3 Cru. Dig. 110.

terhouse, it was said, in an old case, was a common way for the inhabitants of London to St. J. (St. John's), and that they prescribed in it (*a*). So for inhabitants to have a cross way, for it is an easement, and not an interest (*b*). So a lessee for life or years, or a tenant for years, may prescribe for such a way (*c*); and for the like reason, where a way is claimed by prescription, it is no answer to say, (as upon a claim of a way by necessity,) that the party has another road (*d*).

It has been held, that a man cannot claim a way over another's ground from one part to another, but that he may do so from one part of his own ground to another (*e*); although this latter position may well be doubted, as a man cannot prescribe for a right of way over his own land (*f*).

A way may also be prescribed for, like a common *, as appendant to some messuage, or other place (*g*). But if one have a way appendant to his manor, or to his house by prescription, he cannot enjoy it, unless in respect of the possession of that manor or house (*h*). For the appendancy is unalterably attached to that to which it is appendant.

If the jury find their verdict in favour of a prescription, the court will not take notice judicially, whether, as a matter of fact, such a prescription could have existed. As, where one prescribed to travel in *coaches and chariots* from a certain messuage to Barnstaple, &c., it was urged, that this could not be, because coaches and chariots, being of modern invention, have not been in use here time out of mind. But the court said, that the jury found it; that it was a matter of fact, of which they could not take notice after a verdict; but, on the contrary, that they were bound to receive it according to the finding of the jury (*i*).

Private ways claimed. 2. By Grant.

Grant how made.

The next mode of claiming a right of way is by grant. And, in general, the grant would be made by deed. But there is a difference in this respect between grants of land to which a way is appendant, and a grant of a way in gross. In the first case, although there were a parol lease for less than three years, the

(*a*) 18 E. 4. 8. pl. 10.
(*b*) Noy. 120, Stone v. Wakeman.
(*c*) 4 Mod. 366.
(*d*) 6 Mod. 4.
(*e*) 6 Mod. 3.
(*f*) By Doderidge, J. Palm. 388: confirmed by Lord Kenyon, 1 East, 381.
* Only that common appendant must be in respect of land, but a messuage, at least, after verdict, shall be taken to include land.
(*g*) But see Yelv. 159, Godley v. Frith. See also Cro. Jac. 190. However the present form of pleading is to say, "as to the said close belonging and appertaining." Post, Ch. IX.
(*h*) 5 H. 7. 7. by Fairfax.
(*i*) Willes, 71, Chichester v. Lethbridge.

way would pass, according to the rule, that whatever is incident to land will pass by the description of land (*a*); but, in the second, it goes with the person, and must take effect by deed only (*b*). An action was brought for disturbing the use of a way, and it was objected, that the deed of the lease, under which the way was claimed, had not been shown, and that without a deed the way did not pass; and further, that there was no express mention of the way in the lease. But the court considered it to be a matter of necessity, that if land be granted with a way thereto, the way should be quasi appendant to it, and so might pass without being expressed in the lease, for the land could not be used without a way (*c*). And a way appendant cannot be turned into a way in gross, because it is inseparably united to the manor or land to the which it is incident (*d*).

If a way in gross be granted, the grantee may not grant it over to another; and it was so said regarding a way-leave for a term of life (*e*).

The grantor of a way shall not be permitted to defeat the licence which he has conceded. The lessees of a colliery had agreed to grant to the lessees of a neighbouring colliery a licence to use a right of way which the former enjoyed; the owner of the first colliery then (improvidently perhaps) granted the same identical right of way for a term of years to the second lessees. Subsequently, however, this owner became possessed by assignment of the first colliery, and of the way-leave, and he then prepared to remove the materials from the old waggon road, which the second lessees contended he had no right to do, and they moved for an injunction, which was granted, for it was not competent that the owner should interrupt the way in contradiction to his own deed (*f*). But a court of equity will not compel a person, who has agreed to take a way-leave, to the specific performance of such an agreement, where it appears that the way-leave has been rendered useless, though without any fraud on the part of the grantor. It seems, that the court will only grant a *quantum damnificavit* (*g*). Again, one granted land of unequal width to another, which he described as abutting on a road on his own soil. It abutted on the road in the *broadest* part, but a narrow strip of the grantor's land intervened in the *narrowest* part, between the road and the premises granted. It was holden, that the grantor, and such as claimed under him,

(*a*) 2 Ro. Ab. 60. See 11 H. 6. 22 B.
(*b*) See Palm. 387.
(*c*) Cro. Jac. 189, Beaudely v. Brook.
(*d*) 5 H. 7. 7.
(*e*) 7 H. 4. 36. B.
(*f*) 3 Swanst. 99, Newmarch v. Brandling.
(*g*) ——— v. White, cited 3 Swanst. 108.

were concluded from prohibiting the grantee's user of this road over the grantor's strip of land. The grantor had said, "this land abuts on the road": it was, therefore, not competent for him to say, that the land on which it abutted was not the road (*a*).

The following important case concerning waggon ways is inserted here, although the right in question arose by virtue of an act of parliament, and not by grant. A lease of waggon ways was granted to *C. B.* under the authority of an act of parliament. There was a proviso for re-entry, in case he neglected to bring a certain quantity of coals to *C.* close, for the use of the inhabitants of Leeds, and sell them there for a certain price. The preamble of a subsequent act declared, that the price was inadequate, &c., and it then declared, that *C. B.* might sell his coals brought to *C.* close, *or at any other place near* thereto, to be *used as a repository for coals instead thereof*, at a certain increased price. A subsequent section enacted a proviso for re-entry, in case this latter stipulation were not complied with. The court held, that though the preamble of the last act did not recite an intention to permit *C. B.* to change the place used as a repository for coals, nor expressly enacted that he might do so; yet that, as it was plainly the meaning of the legislature that he should be enabled to do so, his lease was not forfeited. For the court, in construing acts of parliament, will give effect to the more extensive clauses contained in them, although no mention of them should be made in the preamble, or elsewhere (*b*).

What a good grant of a way, and under what words it will pass.

Unless a way be appendant to land, a grant of that land will not include the way without express words (*c*). And it will not pass under the term, "tenement." (*d*) But if it be appurtenant, it will necessarily pass under the word, "appurtenances." (*e*) The original owner of land only has the right of demising all ways appertaining to his property, and it is not competent for a lessee to demise such a right in his under-lease. The right of way would not pass under such circumstances. Leases generally contain the words, "heretofore used," by which such ways would pass as have been hitherto enjoyed. But, in the absence of these words, or words to the like effect, the under-lease would confer nothing more than a convenient way (*f*). And so it was, that, where, in a lease, the abuttal on one side was described as an intended way of thirty feet wide, and an under-lease described the ground as abutting on an intended way, without mentioning any width, it was held, that the under-lessee should only have a con-

(*a*) 1 Taunt. 495, Roberts v. Karr.
(*b*) 7 B. & C. 643. Doe, d. Bywater, v. Brandling.
(*c*) 11 H. 6. 22. B.
(*d*) Ibid.
(*e*) Plowd. Rep. 170. 1 B. & P. 375, per Eyre, C. J.
(*f*) By Holroyd, J. 2 B. & C. 100.

venient way by virtue of this demise. When these two leases were made, the road had not been set out, and the owner of the soil subsequently permitted the way, which had been thirty feet wide, to be narrowed to twenty-seven feet; the under-lessee, upon this, brought an action against a purchaser of the surplus way, who had built a wall, but he was restricted, as we have said, to a *convenient* way (*a*).

A grant is always construed strongly against the grantor; so that, if he should grant premises with all ways, all ways ordinarily used shall go to the grantee. As, if one seised of *B.* and *W.* use a way through *W.* to *B.* and then grant *B.* with all ways, the way through *W.* shall pass to the grantee (*b*). A lease granted in 1814, to take effect from 1820, demised certain houses to the plaintiff, together with a piece of ground, part of an adjoining yard, with all ways to the said demised premises belonging, or with any part thereof used or enjoyed. At the time of granting the lease, the whole of the yard was occupied by one person, who had been accustomed to use a right of way to every part of the yard; and the court held, that the plaintiff, the lessee, was entitled to that right of way to the part of the yard demised to him (*c*). It is observable, that a mistake of the grantor in calling ways appurtenant, which, in fact, may be only convenient and accustomed ways, will not vitiate the grant. And so, where there was a demise of ways appurtenant, which was an improper expression, because they were over the land of the same owner, and no proof was given of any other way *in alieno solo*, that would satisfy the words of the grant, Mansfield, C. J., said, that the subsisting ways should be intended for the purpose of sustaining the demise of ways (*d*). So, it is laid down, that where the word "appertaining" cannot have its proper signification, it shall have such a signification as was intended by the parties (*e*). The legal construction of a grant of right of way is not necessarily confined to a grant, in its ordinary acceptation. For where the defendant entered into articles by which he agreed that for a certain consideration the plaintiff should have and use a way through and over his close, it was holden, that this was a good grant of a way (*f*).

Grant of way when presumed.

"In cases of rights of way, &c. the original enjoyment cannot be accounted for, unless a grant has been made; and therefore, it is, that, from long enjoyment, such grants are presumed." (*g*)

(*a*) 2 B. & C. 96, Harding v. Wilson.
(*b*) Com. Dig. Chimin, D. 3.
(*c*) 5 B. & A. 830, Kooystra v. Lucas.
(*d*) 3 Taunt. 31, in Morris v. Edginton.
(*e*) Plowd. Rep. 170.
(*f*) 3 Lev. 305, Holms v. Seller.
(*g*) 5 B. & A. 237, by Holroyd, J.

A user for twenty years exercised adversely, and without any thing to qualify it, will afford sufficient grounds for the jury to presume a grant. Thus, where an occupation way over the *locus in quo* had been assigned under the award of commissioners of enclosure, to one *Joseph* W. *by mistake* for *John* W.; but it appeared on the trial, that the occupiers of Joseph's close had used this way uninterruptedly for more than twenty years, and, indeed, had done so before the award; the learned judge who presided, left it to the jury to say, whether there had not been an adverse possession, although the enjoyment of the way might, in fact, have originated in mistake. He told the jury, moreover, that, if they thought the defendant's (Joseph's) enjoyment had been only *by leave, or favor, or otherwise than as under a claim or assertion of right, it would repel the presumption of a grant,* or, if they thought the way had not been enjoyed adversely for twenty years, they must find for the plaintiff. The jury gave their verdict for the defendant, and the court were urged to set aside the verdict on the ground of a misdirection by the judge, in saying, that a grant of the way might be presumed from adverse user, although originating in mistake. But the application was unsuccessful, for nothing appeared in the evidence to show, that the parties referred their acts to the award; and then it came to the common case of adverse enjoyment for twenty years, which was distinctly proved for the defendant (*a*). Had any facts appeared sufficient to warrant the objection, it is probable that the direction of the learned judge might have been more seriously canvassed. "For if, exercising the right of way from time to time, it had appeared, that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than that the party himself insisted on at the time." (*b*)

In a subsequent case, where an alleged right of way had been pretty constantly contested, but the defendant had pleaded that his deed of grant had been lost, the learned judge directed the jury, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that that deed had been lost, they should find for the defendant; but that, if they thought there had been no way granted by deed, they should find for the plaintiff. The jury said, they could not find any deed, and found for the plaintiff. This ruling of the learned judge was held to be perfectly correct (*c*).

Private ways claimed. 3. From necessity.

It is a principle of law, that the grant of a thing shall carry

(*a*) 3 East, 294, Campbell v. Wilson.

(*b*) 3 East, 302, by Lawrence, J.

(*c*) 3 Bing. 115, Livett v. Wilson. See Bull. N. P. 75, Keymer v. Summers, where Yates, J., held, that 30 years' user of a way would afford a presumption of a grant or licence.

all things included, without which, the thing granted cannot be had (*a*). Therefore, if *A.* have an acre of ground in the middle, and surrounded by other of his lands, and enfeoff *B.* of that acre, here, of necessity, a convenient way arises on *B.*'s behalf to go over *A.*'s ground as a necessary incident (*b*). Suppose a man to have four closes lying together, and he sell three of them, reserving the middle close, but not mentioning expressly the reservation of any way for himself, and that he have no way to the middle close, except through one of the closes sold; here the law will reserve a way for his benefit, and although he had both lands, there would not be any extinguishment of the way (*c*). It is the same, though the close aliened be not totally inclosed by the grantor's land, but partly by the land of strangers, for the grantee may not go over the strangers' land (*d*). A person, as a trustee, conveyed land to another, to which there was no access except over the ground of the trustee, and it was said, that the plaintiff (the trustee) had joined in the grant to the defendant merely as a trustee, and not in his own right, and therefore ought not to be concluded by such an act to his own prejudice. On the other side, the claim of a way of necessity was strongly urged as established in Dutton *v.* Taylor (*e*); because, as it is there said, it is for the public good that the land should not be unoccupied; and Lord Kenyon declared himself disposed, independently of any other point, to accede to the authority of that case*. But he said, that on the principle, that every deed must be taken most strongly against the grantor, the case before the court was clearly against the trustee who had brought the action, for it could not be intended that he meant to make a void grant; it must be supposed, that some beneficial interest would be conferred, and then, here arose a way of necessity, because a man had granted a close surrounded by his own land (*f*).

Lord Kenyon seemed to consider, that there was considerable difficulty in the general question, that a way must of necessity exist where the land of one man is surrounded by that of another. And he is said to have expressed that opinion at Gloucester summer assizes in 1797 (*g*). And Mr. Sergeant Williams denies that *general* right, as if, to use his own words, "a self-created

(*a*) Hob. 234.

(*b*) Noy. 123, Oldfield's case. Id. 14, by Williams, J.

(*c*) Ow. Rep. 122, Cro. Jac. 170. Clark v. Cogge. 2 Lutwy. 1487, 9. Dutton v. Taylor. 2 Siderf. 39, Packer v. Welsted. See also 5 Taunt. 311, Buckby v. Coles.

(*d*) 2 Ro. Ab. 60.

(*e*) 2 Lutwy. 1487. Supra.

* "Though," added the learned lord, "I cannot say, that my reason has been convinced by it." 8 T. R. 56.

(*f*) 8 Term. Rep. 50, Howton v. Frearson. See also 1 Taunt. 495, Roberts v. Karr.

(*g*) In Large v. Pitt, 2 Wms. Saund. 323, n. 6.

necessity could be, either in law or reason, any justification of a trespass committed on another's land." (*a*) So Lord Ellenborough: speaking of a bad plea, he says, "It seems to suppose, that wherever a man has not another way, he has a right to go over his neighbour's close. But that is not so." (*b*) Unity of possession, observes the Sergeant, is the foundation of the right; and he puts the claim of the way of necessity upon this principle, that a way to the close granted exists over the grantor's land as incident to the grant, for without it no benefit could be derived from the grant (*c*). And this is the principle mentioned in Hobart, and which has been quoted in a former page. Thus it is, that a rector may enter into a close to carry away the tithes by the usual road, for the privilege is incident to that right to the tithes which the law has given him (*d*). So, if one have, either by grant, or prescription, a right to wreck thrown upon another's land, of necessary consequence he has a right to a way over the same land to take it (*e*).

It is, therefore, agreed on all hands, and all the authorities support the doctrine, that in the case of a grant of land without a reservation of any way, a way of necessity will pass as incident to it. And a way of necessity thus considered will be found to be nothing else but a way *by grant* (*f*).

But authority is not wanting to the effect, that, under any circumstances, if one man's land be encompassed by another, such a way exists. Thus, one reason for the judgment in Dutton *v.* Taylor was, that the *land should not be unoccupied* (*g*). And again, if *A.* have an acre of ground surrounded by ground of *B.*, *A.*, for necessity, has a way over a convenient part of *B.*'s ground to his own soil, as a necessary incident to his ground (*h*). But this observation does not appear in the report of the same case in Lord Raymond (*i*), and Holt, C. J., there said, that the way of necessity should have been pleaded as passing by the demise there stated, *as appurtenant.*

If there have never been an unity of possession, and the way have been used immemorially, it may be claimed by prescription (*k*).

(*a*) 1 Wms. Saund. 323, n. 6, in Pomfret v. Ricroft.
(*b*) 4 M. & S. 392.
(*c*) Ibid.
(*d*) See 2 Lutwy. 1314. 2 New. Rep. 466. 1 Wms. Saund. 323, a. n. 6.
(*e*) 6 Mod. 149, Anon.
(*f*) 1 Wms. Saund. 323, n. 6. This law, as to the way of necessity, thus laid down, by Mr. Sergeant Williams, is recognized with much approbation by Lord Ellenborough. 4 M. & S. 393.
(*g*) 2 Lutwy. 1489.
(*h*) 6 Mod. 3, Staple v. Heydon.
(*i*) 2 Ld. Raym. 922.
(*k*) 1 Wms. Saund. 323, n. 6. It is reasonable to conclude that this general question is not very likely to be agitated. For if a way have been immemorially

What way to be claimed.

As a general principle, the ancient way should be the subject of the claim. The defendants, one of whom was the owner of a close within a close belonging to the plaintiff, had a prescriptive right of way through the plaintiff's close to his own. The plaintiff stopped up the old way, and made a new one, which had been used for upwards of twenty years, but he then thought fit to stop up this way also. The defendants removed the obstruction, and the plaintiff brought an action against them. It was very strongly urged for the defendants, that they were necessarily obliged to go this way to their close, there being no other passage open. But the court gave judgement for the plaintiff. The new way was only by sufferance, which might be determined at pleasure, and the defendants ought to have had recourse to the prescriptive right of way. And as to there being no other way *open*, the defendants, in order to have succeeded, ought to have been able to say, that there was no other way, which they could not do (*a*). However, where the defendant pleaded a right of way, from time immemorial, and that the plaintiff, having stopped it up, had assigned a new one, and so justified the trespass, the plea was held good, because here, the plaintiff had not *stopped up the new way also*, and, so, *volenti non fit injuria* (*b*).

Where the owner of a close sowed it, and left a way over another part of the close, in which, however, there existed an ancient way, the court held, that the defendant might well justify going along the ancient way, and that he was not bound to go in the way which was unploughed (*c*).

It seems, however, that, if a man possessed of a close surrounded by others, grant that close, the grantee is not bound to use the same way that his feoffor has done, but shall have a convenient way (*d*). And this, at first sight, militates against the position just laid down, that the ancient way alone must be adhered to. But here the old way is extinguished, and the new arises out of the necessity of the thing. And it should be a convenient road; for where the feoffor has land on all sides, it will be immediately perceived, that a road extremely convenient to him, who is the owner of all the surrounding property, might be most inconvenient to his grantee, whose homestead might possibly be in a different direction; and there may, consequently, be a distinction in this respect between cases where the surrounding land is the grantor's, and where it belongs to a stranger. And

used from the land of *A.* over that of *B.*, it may be claimed by prescription; and if *A.* sell his land without mentioning the way, it will go over to the vendee by virtue of the grant. It seems difficult to imagine how the question can arise at this day.

(*a*) Willes, 282, Reignolds v. Edwards.
(*b*) Yelv. 141, Horne v. Widlake. 1 Brownl. 212, S. C.
(*c*) Noy. 128, Horn v. Taylor.
(*d*) Noy, 123, Oldfield's case.

in this sense we should probably understand the words of Lord Chief Justice Mansfield, in a case where the defendant was charged with obstructing the lessee's right of way: "I say nothing of what is a way of necessity; I know not how it has been expounded: but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." (*a*) And so in another case, it is said, that the way should be over a *convenient* part of the grantor's land, as a necessary incident (*b*). Subject to this rule, the grantor may probably be justified in assigning such a way as he can best spare (*c*).

It has been held, that this way of necessity is only coeval with the necessity which creates it. A man was possessed of four closes, and was accustomed to pass from the first through the second and third into the fourth, there being no other way. Subsequently he purchased another close, and he then parted with the two closes in the middle of the first four, and still contended, that he had a right of road from the first to the fourth through these two as a way of necessity. An action was brought against him, and it was denied that he had this right, for it was said, that he might pass from the fourth to the first close by way of the new close which he had purchased, and that, at all events, he could reach his own land by merely skirting the third road, and so entirely avoid the second. And the court, therefore, gave judgement against him: for "this inconvenience," said Lord Chief Justice Best, "might follow, that a party might retain a way over 1000 yards of another's land, when by a subsequent purchase he might reach his destination by passing over 100 yards of his own." With respect to any way by prescription, that must have been extinguished by the prior unity of possession (*d*). It appears from the last case, that if the *grantor* sell his close, having a way over it, and have then no other way, the way will be deemed to have been reserved out of the feoffment. And so it is, when a man having a close surrounded by other land of his own, sells the *other land*, and reserves the close to himself, here the way survives by necessary implication (*e*).

More will be said on the way of Necessity in the chapters upon User, Interruption, and Extinguishment of Ways.

Ways may also be claimed by custom. As where navigators have a right of this nature to tow along the banks of navigable rivers with horses; in this case, their privilege of

By custom.

(*a*) 3 Taunt. 31.
(*b*) 6 Mod. 3.
(*c*) 2 Ro. Ab. 60.
(*d*) 2 Bing. 76, Holmes v. Goring. 9 Moore, 166, S. C. See Ch. V.
(*e*) 1 Wms. Saund. 322, (b) n. 6.

way is founded upon the quantum of usage. It was once said by Holt, C. J., that "if one have land adjoining on a navigable river, every one that uses that river has, if occasion be, a right to a way by the brink of the water over that land, or further in if necessary." (*a*) And the same learned judge held at Nisi Prius, that the public should have towing paths on the banks of navigable rivers by virtue of the common law (*b*). But there is an authority to the contrary of this position, in which Lord Kenyon, observing upon the note in Lord Raymond, says, that, at most, it was only an opinion delivered at Nisi Prius, and that the authority of Lord Chief Justice Willes was at variance with it (*c*). He went on to say, that the right to tow in this manner must be ascertained by the usage; that such a custom certainly did exist on most of the navigable rivers; but still, that the right was founded solely on the *custom*. The right of the public, therefore, generally, without any custom, was denied (*d*). It was also said, that the opinion of Lord Hardwicke by no means favoured the general right (*e*), since he directed a second new trial on the question, whether there were a right to a track-path on each side of the river Tees for towing, and which issue had been found (contrary to the Chancellor's impression) in the affirmative (*f*).

Independently too of usage in the particular place, the public have no right to cross the sea-shore for the purpose of bathing. The defendant pleaded to an action of trespass, that all the liege subjects of our lord the king had been used and accustomed, and had a right to bathe in the sea from time to time over any part of the said close, in which, &c., and, for that purpose of going and returning, &c. on foot, and with their servants, and with carriages and bathing machines drawn by horses to the sea and back again, &c. A verdict having been found for the plaintiff on the issue joined upon this plea, a special case was made for the opinion of the Court. And it was holden by three judges against one (*g*), that no common law right of bathing, which the defendant claimed, existed: that public convenience was to be viewed with a due regard to private property; and that no practice was brought before the attention of the Court sufficiently extensive or uniform to be the foundation of a judicial decision (*h*). The words of Abbott, C. J.,

(*a*) 6 Mod. 163.
(*b*) 1 Ld. Raym. 725, Young v. ———. See also, Zangers v. Whiskard, cited in 3 T. R. 259.
(*c*) Vernon v. Prior, cited 3 T. R. 254.
(*d*) 3 T. R. 253, Ball v. Herbert.
(*e*) By Lord Kenyon, 3 T. R. 262.
(*f*) 1 Burr. 292, Pierse v. Lord Fauconberg. See 1 Marsh. 313, Miles v. Rose.
(*g*) Best, J.
(*h*) 5 B. & A. 268, Blundell v. Catterall.

are worthy of attention. "In some parts, the king is the owner of the shore; and it is not probable that any obstruction would be opposed on his behalf to such a practice. Of private owners, some may not have thought it worth while to advance any claim or opposition; others may have had too much discretion to put their title to the soil to the hazard of a trial by an unpopular claim to a matter of little value; others, and probably the greater part, may have derived or expected so much benefit from the increased value given to their own land above, by the erection of houses and the resort of company, that their own interest may have induced them to acquiesce in, and even to encourage the practice, as a matter indirectly profitable to themselves." (*a*)

Lastly, it should be observed, that a claim of two ways inconsistent with each other cannot be supported, so that, where a general and a private particular way by prescription were demanded in the same count, the court held the claim inadmissible (*b*).

(*a*) 5 B. & A. 314.
(*b*) Willes, 71, Chichester v. Lethbridge.

CHAPTER III.

Of the User of Ways.

The different kinds of ways, and the rights under which they may be claimed, having been considered, we proceed to speak of the proper user, or lawful enjoyment of them. And with respect to highways, the user may be general for foot passengers, horses, carriages, and *cattle*. Although the way may be so unfrequented as that no one has seen an instance of cattle being driven there, yet the presumption would be in favour of that right; for, otherwise, cattle could not be driven from one part of the kingdom to another (*a*). But there may be a notice to caution the public that there is no drift-way (*b*).

This user is also regulated by legislatorial provisions.

We shall here, in the first place, notice such methods of passing along the highway as, but for the prohibitions of acts of parliament, would not be deemed offences or interruptions, having reserved a Chapter (*c*) for the consideration of actual obstructions.

Drivers on highways.

Thus, if the driver of any cart, car, dray, or waggon, ride on them upon any street or highway, without some person, on foot or horseback, to guide them, he incurs a penalty not to exceed 10*s.*, unless he be the owner, in which case the forfeiture is not to exceed 20*s.* (*d*) There is an exception if some person should hold the reins of the horses, although riding (*e*). Again, there is a like penalty against the driver of any carriage whatsoever, if he hurt any one on the highway by negligence or wilful misbehaviour, or if he quit the high road and go on the other side of the inclosure, or if he leave the carriage in such a way as to lose the guidance of it (*f*). And so it is, again, if the driver of an empty, unloaded carriage of any kind, refuse to make room for a coach, chariot, chaise, loaded waggon, cart, or other loaded carriage (*g*). And, again, if any one will drive, or act as the driver of a coach, post-chaise, or other carriage, let for hire, or of a waggon, wain, or cart, without having the owner's name painted, as

(*a*) 1 Taunt. 283, by Mansfield, C. J.
(*b*) 1 Taunt. 285.
(*c*) Chap. IV.
(*d*) 13 G. 3. c. 78. s. 61.
(*e*) Ibid.
(*f*) Ibid. Or, interrupt the free passage of carriages, or people. Ibid. And post. Ch. IV.
(*g*) Ibid.

is required by the 60th section*, or if he refuse to discover the christian and surname of the owner of such carriages, he shall be fined in like manner (*a*). The conviction may take place upon his own confession, the view of a justice of the peace, or the oath of a credible witness, before a justice of the limit (*b*). Should there be a default of payment, the party may be sent to the house of correction for a month, unless he pay sooner; and the driver may be apprehended, with or without warrant, by any body who may happen to see the offence committed, and be delivered to the constable, &c., for the purpose of being taken before a magistrate; and, should the driver refuse to disclose his name, the justice may send him to the house of correction for three months, or proceed against him for the penalty, by a description of his person and offence, expressing, at the same time, in the proceedings, that the party refused to discover his name (*c*).

Drivers on turnpike roads.

Drivers on *turnpike roads* are made subject to regulations of a similar nature. If the driver of a waggon or cart, of any kind, shall ride upon them in a turnpike road, without some one on foot or horseback to guide them, he is to be fined in a penalty not exceeding 40*s.*, unless he be the owner, in which case there is to be a penalty not exceeding 5*l.* (*d*) There is an exception in favour of such light carts as are usually driven with reins, and are in fact so driven; but there must not be more than two horses (*e*). There are also the same prohibitions against injuring others, quitting the road, driving without the owner's name†, as

* *Names of owners on waggons.*—For the better discovery of offenders, the owner or owners of every waggon, wain or cart, and also of every coach, post-chaise, or other carriage, let to hire, shall paint, or cause to be painted, upon some conspicuous part of his waggon, wain, or cart, and upon the pannels of the doors of all such coaches, post-chaises, or other carriages, before the same shall be used upon any public highway, his or her christian and surname, and the place of his or her abode, in large legible letters, and continue the same thereupon so long as such waggon, cart, coach, post-chaise, or other carriage, shall be used upon any such highway; and the owner of every common stage waggon or cart, employed as travelling stages from town to town, shall over and above his or her christian and surname paint or cause to be painted on the part and in the manner aforesaid, the following words, common-stage waggon, or cart, as the case may be; and every person using any such carriage as aforesaid upon any highway, without the names and descriptions painted thereon respectively as aforesaid, or who shall paint, or cause to be painted, any false or fictitious name or place of abode on such waggon, wain, cart, coach, post-chaise, or other carriage, shall forfeit for every such offence a sum not exceeding five pounds, nor less than twenty shillings.

(*a*) 13 G. 3. c. 78. s. 61.
(*b*) Ibid.
(*c*) Ibid.
(*d*) 3 G. 4. c. 126. s. 132.
(*e*) Ibid.

† *Names of owners on waggons.*—Turnpike act, 4 G. 4. c. 95. s. 15. For the better discovery of offenders, the owner or owners of every waggon, wain, or cart, or other such carriage, shall from and after the first day of October, one

in the highway act; but the penalty on the driver is a sum not exceeding 40*s.*, and on the owner not exceeding 5*l.* Moreover, if the driver of a waggon, or of any carriage, should not, when meeting another carriage, keep to the left side of the road, the same forfeiture will accrue (*a*). The mode of conviction, and proceeding upon default, are substantially the same as in the highway act.

Children under thirteen not to drive.

Children who shall not be of the full age of thirteen years are forbidden to drive a cart or waggon on the turnpike road, under a penalty of not more than 10*s.*, which is to be paid by the owner of the carriage (*b*).

There is, moreover, this provision; that, one person may act as the driver of two carts on a turnpike road, but there must not be more than one horse to each cart, and the horse of the hinder cart must be attached by a rein to the back of the foremost cart, on pain of a forfeiture of 20*s.* (*c*) But this permission is not available at a less distance than 10 miles from the cities of London and Westminster (*d*).

Lastly, if the driver of any waggon, cart, coach, or carriage, incur a penalty for offending against the provisions of any act for making or maintaining a turnpike road, and refuse to give his name, or if he abscond or absent himself so as not to be found, any justice, upon complaint, shall issue a summons requiring the owner of the carriage to appear, and answer the matter. If the owner make default by refusing or neglecting to appear, or if he appear, and do not within ten days either produce the offending driver, or disclose his name or place of abode, the justice, or any other justice, after examining into the circumstances, and satisfying himself by proof on oath that an offence has been committed, shall adjudge the owner to pay the penalty. The penalty

thousand eight hundred and twenty three, paint, or cause to be painted, in one or more straight line or lines, upon some conspicuous part of the right or off side of his, her, or their waggon, wain, or cart, or other such carriage, or upon the off side shafts thereof, before the same shall be used on any turnpike road, his, her, or their christian and surname, and place of his, her, or their abode, or the christian and surname and place of abode of the principal partner or owner thereof, at full length, in large legible letters, not less than one inch in height, and continue the same thereupon so long as such waggon, wain, cart, or other such carriage, shall be used upon any turnpike road; and every owner and proprietor of any waggon, wain, or cart, or other carriage, who shall use or allow the same to be used on any turnpike road, without the names and descriptions painted thereon as aforesaid, or who shall paint, or cause to be painted, any false or fictitious name or place of abode on such waggon, wain, or cart, or other carriage, shall forfeit and pay for every such offence a sum not exceeding *five pounds*.

(*a*) Ibid. Or, if he interrupt other carriages, or the public. Ibid. And see post. Ch. IV.

(*b*) 3 G. 4. c. 126, s. 131.

(*c*) 3 G. 4. c. 126. s. 130.

(*d*) Ibid.

is to be recovered and applied in the usual way prescribed by the act (*a*).

The user of the *highway* with horses in waggons and carts is restricted. The number of horses is regulated by the breadth of the wheels*, as will appear from the following scale. Highways, with how many horses to be used.

Waggon.	To be drawn by not more than		*Cart.*	To be drawn by not more than	
With 9-inch wheels	8	horses.	With 9-inch wheels	5	horses.
With 6-inch wheels, but rolling on each side a surface of 9 inches.....	7	do.	With 6-inch wheels	4	do.
With 6-inch wheels, but rolling a surface of 6 inches ...	6	do.	Less than 6-inch wheels.....	3	do.
Less than 6-inch wheels	5	do.			

But carriages moving upon wheels or rollers of the breadth of 16 inches on each side, with flat surfaces, may be drawn with any number of horses or other cattle (*b*). The penalty for disobeying the above rule is 5*l.* upon the owner, and 10*s.* on the driver for every horse beyond the legal number, and it is to go to the sole use and benefit of the informer (*c*). There is an exception in favour of carts, waggons, or carriages carrying any one stone, block of marble, cable, rope, or piece of metal, or piece of timber, or ammunition or artillery for the king's service (*d*).

A table of weights as allowed upon turnpike roads follows in this place; but with respect to the exemptions from additional tolls which are imposed for over-weight, it has been thought proper to mention them under the head of tolls in a future part of this treatise (*e*). Weights upon turnpike roads.

(*a*) 4 G. 4. c. 95. s. 73.

* The ordinary breadth of wheels allowable on turnpike roads will be found in a future page, under the head of "Tolls," Ch. VII.

(*b*) 13 G. 3. c. 78. s. 56.

(*c*) Ibid.

(*d*) 13 G. 3. c. 78. s. 59.

(*e*) Post. Chap. VII.

Table of weights.

TABLE OF WEIGHTS allowed in Winter and Summer to Carriages directed to be weighed (including the Carriage and Loading).

	SUMMER.		WINTER.	
	Tons.	Cwt.	Tons.	Cwt.
For every waggon with 9-inch wheels .	6	10	6	0
——— cart with 9-inch do.	3	10	3	0
——— waggon with 6-inch do.....	4	15	4	5
——— cart with 6-inch do.	3	0	2	15
——— waggon with wheels of the breadth of 4 inches and a half.....	4	5	3	15
For every cart do. do.....	2	12	2	7
——— waggon with wheels of less than 4 inches and a half.....	3	15	3	5
——— cart do. do....	1	15	1	10(*a*)

These regulations respect waggons, wains, carts, or *other* such carriages (*b*).

Additional weights.

Additional weights are allowed upon certain occasions. As, to every caravan or other four-wheeled carriage used for the conveyance of goods, and built and constructed with springs,

	SUMMER.		WINTER.	
	Tons.	Cwt.	Tons.	Cwt.
For every such carriage.....	4	5	3	15(*c*)

And to every dray with two wheels of not less than $4\frac{1}{2}$ inches in breadth, and drawn by not more than 3 horses, and used in London, or within the bills of mortality, there shall be allowed at all times of the year, together with the loading of the dray, the full weight of 2 tons 16 cwt. (*d*)

Penalty on persons unloading before coming to the weighing machine.

A penalty is imposed upon any person endeavouring to evade the weighing at the proper place. For whoever shall unload any goods, &c. from any cart, waggon, or other carriage, or cause them to be unladen, before the same shall come to any turnpike gate or weighing machine, or shall load or lay upon any such carriage after it shall have passed any such gate, &c. any goods, &c. taken or unladen from any horse, cart, or other carriage belonging to or hired, or borrowed by the same waggoner or carrier, in order to avoid payment of the duties for overweight; or if any person shall so unload in order to carry considerable quanti-

(*a*) 4 G. 4. c. 95. s. 89.
(*b*) 3 G. 4. c. 126. s. 12.
(*c*) Id. s. 13.
(*d*) Id. s. 14.

ties of goods through any gate or machine in one and the same day, and so pay less toll than if the goods, &c. had not been unladen; or if any driver of any waggon or cart shall not wait a reasonable time, whilst any other carriage shall be weighed which shall have come to the engine before the carriage of which he is the driver; or if such driver shall refuse or delay to remove or draw any such waggon, &c. from the machine, so as to impede or delay the weighing of any other waggon, &c., or shall turn or drive out of the road in order to avoid or evade the weighing of any waggon, &c., the offender, being lawfully convicted before one or more justices for the limit where the offence was committed, upon the oath of a credible witness, shall forfeit 5*l.*, to be levied upon the goods and chattels of the owner of the waggon, &c., and every driver, not being the owner as aforesaid, shall, on conviction, pay 40*s.*, and in default of payment shall be sent to the house of correction for a term not exceeding two calendar months (*a*).

Supernumerary horses.

Both in the highway and turnpike acts, two oxen are to be considered as one horse for all the purposes of the respective acts (*b*). Power, however, is given to magistrates to license, at their general quarter sessions after Michaelmas, an increase of horses over and above the number, to go up a steep hill, or upon any road, not being turnpike, within their jurisdictions, if they shall see fit upon inquiry into the condition of the roads, and this license may be revoked, altered, or varied at any Michaelmas quarter sessions (*c*).

If the prosecution for using supernumerary horses be before a justice of peace, the information must be laid within three days after the offence; if there be an action intended, it must be brought within one calendar month, and in either case, notice must be given to the owner or driver of the intention to prosecute on the same day on which the offence has been committed (*d*). But magistrates are invested with authority to mitigate or abolish these prosecutions. If the offender should live so far off, as to make it inconvenient for him to attend before the justice, the complaint may be dismissed, and the informer left to his remedy at law (*e*).

The justice may stop the proceedings, and, indeed, is bound to do it, where it is sworn by credible witnesses, to his satisfaction, that the ordinary allowance of horses or beasts of draught cannot draw the waggon, &c. on account of deep snow or ice.

(*a*) 3 G. 4. c. 126. s. 20.
(*b*) 13 G. 3. c. 78. s. 59. 3 G. 4. c. 126. s. 38.
(*c*) 13 G. 3. c. 78. s. 58.
(*d*) 13 G. 3. c. 78. s. 57.
(*e*) Ibid.

And any court of justice authorized to enforce the execution of the act may exercise the like control (*a*).

Skid pans or slippers on turnpike roads.

To prevent the destruction of roads by locking wheels; skid pans, or slippers, are prescribed by the legislature at the discretion of the trustees of the roads. Such trustees or commissioners of turnpike roads may hold a meeting for the purpose of making the order; ten days' notice in writing being fixed on the turnpikes. This being done, the trustees, &c. may order, that a skid pan, or slipper, shall be placed at the bottom of any locked wheel descending a hill on the turnpike roads during the whole time of its being locked; and in such a manner as to prevent the road from being destroyed or injured. This order may be repealed, altered, or renewed at discretion. If the driver, or any person acting as such, shall offend against this mandate, he is to be fined a sum not to exceed twenty shillings (*b*). But the offence must take place while the order is in force, and a copy of the order must be fixed upon the turnpikes for at least thirty days before it can operate (*c*).

Loaded carts on rail roads.

It is enacted by the turnpike act of 1823, that if any waggon or cart built or constructed to be usually used on any railway or tram-road shall be drawn or pass loaded on any turnpike roads out of or away from such rail-way, &c. for more than one hundred yards, the owner of or proprietor of such waggon or cart shall forfeit forty shillings, and the driver, not being the owner, twenty shillings for each time the waggon or cart shall be so drawn and pass (*d*).

Nails of wheels.

The same act further directs, that the nails of the tires of wheels belonging to waggons, wains, carts, or such carriages, which are used upon a turnpike road, shall be so countersunk as not to project beyond one quarter of an inch above any part of the surface of the tire. The forfeiture for disobeying this is a sum not exceeding forty shillings, to be paid by the owner, and a sum not exceeding twenty shillings to be paid by the driver upon every occasion of using the waggons, &c. upon the road (*e*).

Dogs.

There is a provision respecting carriers' dogs worthy of notice in this place. It is ordained, that whoever has the care of

(*a*) 13 G. 3. c. 78. s. 59. There was a similar provision in the old turnpike act of 13 G. 3. which is not continued in the new statutes upon the subject. But a case occurred under that act, in which it was held, that the application to stay proceedings ought to have been made to the court above in which the action was brought, and that the defence was not available at nisi prius. It will apply, by analogy, to the highway act. 11 East, 484, Robinson v. Pocock.

(*b*) 3 G. 4. c. 126. s. 126.

(*c*) Ibid.

(*d*) 4 G. 4. c. 95. s. 16.

(*e*) 4 G. 4. c. 95. s. 2.

waggons, wains, carts, or such carriages on turnpike roads, and used for the purpose of conveying goods for hire or reward, shall chain or fasten their dogs to the waggon, &c. upon pain of forfeiting a sum not exceeding twenty shillings (*a*).

The prohibitions just mentioned are imposed by the acts of parliament for regulating highways and turnpike roads.

Dedication.

As, however, the better opinion seems now to be, that there may be a partial dedication of a highway to the public, there may, probably, be a restriction by the *owner of the soil* on a particular kind of carriage, a coal cart for instance; and, at all events, a right for foot passengers may be given, with the restriction of a carriage way, for the public are obliged to take *secundum formam doni*. If a land owner, therefore, think fit to grant a road through his estate for all purposes except that of carrying coals, the way so granted must be used according to the permission, and if it cannot be so used without a general dedication of the road, which is contrary to the intention and will of the grantor, it cannot be used at all (*b*).

"The right," to use the words of a very learned judge, "cannot be more extensive than the right imports." (*c*)

Cattle.

Cattle should be driven directly along the highway, and should not be suffered to linger, for it seems, if they do any thing but pass and repass, it is a trespass (*d*). Therefore, where it was pleaded in bar to an avowry that cattle, *being* in the highway, erred and escaped thereout into the adjoining close through defect of fences, the court held the plea bad, for it should have been shown, that the beasts at the time of escaping were passing on the highway (*e*). For the property of the way is in the owner of the soil, subject to an easement for the benefit of the public, and a lawful user must, therefore, appear (*f*). And cattle straying on a turnpike road may be impounded (*g*).

User of private ways.

The extent of the user of private ways is governed in some respects by the same rule which prevails on the subject of highways, namely, that the terms of the grant cannot be overstepped. So that, if there be a grant in, through, and along a particular way, it is not competent for the grantee to go *across* the land. It might be very inconvenient to permit the grantee to use more ways than one; for example, he might destroy the original pas-

(*a*) 4 G. 4. c. 95. s. 76.
(*b*) 7 B. & C. 257, Marquis of Stafford v. Coyney.
(*c*) 7 B. & C. 261, by Holroyd, J.
(*d*) 10 E. 4. 7. Bro. Tresp. pl. 321, cites S. C.
(*e*) 2 H. Bl. 527, Dovaston v. Payne.
(*f*) By Heath, J. 2 H. Bl. 531.
(*g*) 4 Geo. 4. c. 95. s. 75.

turage, and, therefore, a transverse road, under such circumstances, being inconsistent with the original grant, cannot lawfully be made (*a*).

The principle is, that a man cannot use his right of way beyond the terms of his grant, and there are many authorities in support of this position. The defendant justified by prescribing for a right of way to a certain close, but the plaintiff replied, that the defendant had brought a load of hay which grew upon another close, along the way, and this was held a sufficient answer, for if a man have a private way to a close, he must not enlarge it to other purposes (*b*). So, where in trespass it appeared, that the defendant had a way over the plaintiff's ground to another close, *B.*, and that he not only used the way thus, but drove his beasts to a third close, lying still farther off, it was said, that when the defendant had driven his beasts to the close *B.*, to which he had his way, he might drive them whither he would. But it was answered, that the defendant might purchase a hundred or a thousand acres adjoining to the close *B.*, and thus the plaintiff would lose the benefit of his land; and the court acceded to this argument, and gave their judgment for the plaintiff, thereby supporting the doctrine, that a grant ought to be construed according to the intent of its original creation (*c*). So, if one be seised in fee of a place in a town shut out from the street by a gate, and he be also seised in fee of a messuage and piece of land adjoining, and he then infeoff another of that messuage, &c., granting him ingress, egress, and regress in, to, and beyond the same premises and the aforesaid place and gate; under this grant the feoffee may go from the street through the gate, and over the place to the messuage, &c., but not through the said gate or place to other places, or from other places to the street without coming to the messuages, &c., for the licence is made appurtenant to the premises granted (*d*). But if the party have a right to use the way in question, it is no objection to his user, to say, that he passes along with the carriages of a third person. So that, where the plaintiff charged the defendant with making the way foundrous by reason of *his* carts and carriages, and the defendant justified as *servant of one W.*, the court resolved, that the plea was sufficiently good, because the defendant had a property in these carts and carriages by the possession (*e*). It was the same right, and so not inconsistent with the grant.

A right of way for agricultural purposes, is a limited and qua-

(*a*) 1 T. R. 560, Senhouse v. Christian.

(*b*) Freem. 247, Webster v. Bach. See 1 Ro. Ab. 391, Saunders v. Mose, 1 Lutwy. 111, 114. Laughton v. Ward, S. P. 1 Ld. Raym. 75, Lawton v. Ward, S. C. But the special matter must be shewn. 1 Ro. Ab. ubi suprà.

(*c*) 1 Mod. 190, Howell v. King. 39 H. 6. 6. Bro. Chim. pl. 6, cites. S. C.

(*d*) 1 Ro. Ab. 391, Hodder v. Holman.

(*e*) 1 Ld. Raym. 75, Lawton v. Ward. See also 1 Lutwy. 114.

lified right. An action was brought for breaking the plaintiff's close. It appeared, that the occupiers of the defendant's field had always used a certain head-land, belonging to the plaintiff, for agricultural purposes, that there was a lime quarry in the defendant's field, that the defendant had paid an acknowledgement for the use of another road more circuitous than that over the head-land, and that he had only used the *locus in quo* within two years before the action. The defendant was in the habit of carting lime daily over the *locus in quo* which was cultivated, and he contended, that he might carry lime as well as corn over the place in question, and that he might work his quarry generally. But Mr. Baron Wood was of opinion, that the defendant ought to have shown a general and unqualified right, and that he could not succeed by proving his never having been obstructed in a user of the road for purposes of agriculture. The learned judge added, however, that as some slight evidence of a general use had been given, he would leave it to the jury, and they found a verdict for the plaintiff (*a*). A question arose, whether a parson, in carrying home his tithes, had a right to go by any road which the farmer used. It was said, that he might do so, on condition of doing no mischief; but the court entertained a contrary opinion. They said, that the parson might use the same road which the farmer would use for bringing home his nine parts, but that if the parson were entitled to all the farmer's ways, it might occasion great inconvenience. The parson would be entitled to the ordinary occupation way used for the close out of which his tithes issued, and the direct or nearest way to the public road would be the course which the parson should take (*b*). So, if the owner of land have a private road made whilst an unity of possession exists over certain property, which subsequently becomes split into several occupations, the parson shall not necessarily have that road for the purpose of carrying away his tithes, nor is it indispensable that he should use the nearest way (*c*).

Way to be used at seasonable times.

If there be a licence to use a certain way, it seems, that there should be a seasonable user. As if one let a house, reserving a way to a back house, the grantor may not come through the house without request, and that too at seasonable times (*d*).

Landlord may enter to use way.

A landlord may use a way, while the tenement to which it belongs is occupied by a tenant, for the purposes of viewing waste, demanding rent, or removing an obstruction (*e*).

(*a*) Holt's N. P. Cases, 455, Jackson v. Stacey.
(*b*) New. Rep. 466, Cobb v. Selby.
(*c*) 3 Gwill. 1109, Bosworth v. Limbrick.
(*d*) 1 Ventr. 48, Tomlin v. Fuller. 1 Mod. 27. S. C. The lessee was not bound to leave his doors open for the lessor's coming in at one or two o'clock in the night; but he, the lessor, must keep good hours. 1 Mod. 27. By Twisden, J.
(*e*) 1 B. & C. 8, Proud v. Hollis.

What grantee of way may do.

The grantee of a way may not only use it by passing, repassing, &c. consistently with his privilege, but he may do anything within the terms of the licence which may promote his own convenience and comfort. There was a grant of "*a free and convenient way,* as well an horseway as a footway, as also for carts, waggons, wains, and other carriages whatsoever, in, through, over, and along, &c." "with full and free licence to make and lay causeways, &c." with the user and enjoyment of the way, and "full and free liberty by all or any of the ways or carriages aforesaid, to lead and carry stone, &c. *coal,* or other things," &c. A framed waggon way for the conveyance of coal was made over the land granted, and it was contended, that this could not be done under the terms of the grant. It was said, that one way only had been granted for the several purposes of passing on foot, on horseback, and in common carriages, and that the road should be used and repaired in such a manner as to meet all these uses; and with respect to causeways, it was urged, that the licence ought to be understood of such ways as were in use at the time of the grant, and framed waggon ways were not then used. But the court were quite clear, that the grant had not been abused, the parties had the carrying of coal in their contemplation at the time of making the grant, and the grantee had a right to it in any manner necessary for the purpose of enjoying the privilege intended to be granted (*a*).

A right to use a piece of land as a foot or carriage-way was granted, and therewith, "all other liberties, powers, and authorities incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the said road, way, or passage." The original grantee possessed certain houses which abutted upon the piece of land thus granted, and which were divided from a house of the grantor of the land in question. By virtue of this licence a *flag stone* was put down against a door of one of the grantee's houses leading into the road, and this stone being taken away by the defendant, an action was brought. The plaintiff recovered, by consent, and the court held, that he should retain his verdict. At common law the right to repair is incident to the grant of a way, and if the plaintiff had repaired with gravel, it might in time have become a puddle, so that he had a right to lay the stone for a permanent repair. It was further said, that the grantee might use the way in the manner most convenient to himself, provided he did not thereby produce any inconvenience to the grantor (*b*).

User, when ways are out of repair.

The course for passengers to pursue, when a road is foundrous, overflowed, or out of repair, with the distinction, in this respect, between *highways* and private ways, will be pointed out in the next chapter, on Interruptions.

(*a*) 1 Term Rep. 560, Senhouse v. Christian.
(*b*) 2 New. Rep. 109, Gerrard v. Cook.

CHAPTER IV.

Of Obstructions, or Interruptions of Ways, with the Remedies.

The object of this chapter is to mention some of the interruptions which occasionally take place on public and private ways, and the various remedies which may be available in such cases. But we do not propose to treat here of the *entire* stoppage of ways which magistrates and other persons have power to direct by virtue of legislative enactments. The exercise of such an authority is one of those acts which extinguish a way, and a separate chapter is devoted to the consideration of extinguishment (*a*). So, again, a distinct portion of the treatise is set apart for the question of *repair* of ways; the consideration, therefore, of that remedy, where a road is obstructed by reason of its being ruinous, or in decay, will be found in another place.

We propose to notice,

I. What are interruptions.

II. What road passengers may take when the obstruction arises from accident, &c.

III. What the remedies are, when the road is *wilfully* obstructed.

I. What an interruption.

The legislature has forbidden all obstructions on highways and turnpike roads, and has so regulated those public ways as to afford the most ample enjoyment of a full and free passage along them.

No trees allowed.

Thus, no tree, bush, or shrub is allowed in any highway within fifteen feet from the centre, unless it be for ornament or shelter to the house, building, or court-yard of the owner. The surveyor is ordered, on pain of forfeiting ten shillings, to give notice to the owner or occupier of the land where the tree, &c. may be, and, within ten days after such notice to the party, or to the steward or agent, the nuisance must be cut and carried away by him, whether owner or occupier (*b*). Where timber trees stand upon ground bought for the purpose of making it a public highway, they must be fallen and taken away by the owners within a month after the order for altering the road, and if they neglect, it becomes the duty of the surveyor to do it, and

(*a*) Ch. V.
(*b*) 13 Geo. 3. c. 78. s. 6. See post. in Ch. VII. Lowen v. Kaye.

to lay the timber upon the land adjoining, for the benefit of the owners (*a*).

Hedges and boughs of trees.

Hedges, and boughs of trees must be kept cut and pruned. The possessors of the land next adjoining to every highway must cut, prune, and plash their hedges, and cut down, prune, and lop the trees* growing in or near the hedges or other fences, in such a manner as that the highways shall not be prejudiced by the shade, and that the sun and wind shall not be excluded from the highways to their damage. Should there be a neglect to do this, the surveyor must complain to a justice of the limit, and the possessor shall then be summoned to some special sessions to answer the complaint. If it be the opinion of the Bench that the requisites of the act have not been complied with, after hearing both the surveyor and the land owner, (or, if he do not appear, after due proof of summons,) they may order the hedges, &c. to be cut, &c. as is mentioned above. Further, if the possessor of the land shall not obey the order within ten days after due notice, he is made subject to a forfeiture of two shillings for every *twenty-four feet in length* of hedge so neglected, and two shillings for every neglected tree; and the surveyor is then empowered and required to fulfil the order, the charges of which must be paid by the defaulter, or, if he do not pay, may be levied upon his goods by warrant. There is an exception in favor of trees planted for shelter or ornament, as mentioned in the sixteenth section (*b*). There is, however, a time prescribed for these prunings, &c. and it is provided, that no surveyor shall *compel* the cutting of *hedges* except between the last day of September and the last day of March; that no person need fell timber trees growing in hedges *at any time*, unless in the case of enlarging highways; that no oak trees growing within the highway or the hedges need be cut except in April, May, or June; nor any ash, elm, or other trees, except in December, January, February, or March (*c*).

The same regulations, with very trifling differences, are in force for the good of turnpike roads. The cutting of the hedges must be *six feet from the surface*† of the ground, and the branches of trees, *bushes, and shrubs* must be also cut. Upon the complaint of the surveyor, the offender may be summoned before the justice himself, (and not at special sessions, as in the highway act,) who shall enforce the provisions of the act. The forfeiture for every tree, *bush, or shrub* neglected to be cut, *is twopence*. There is

(*a*) 13 Geo. 3. c. 78. s. 16.

* Under the old law, a man was said not to be bound to lop his trees which encumbered the way, although another might have done it. By Keble, J. 8 H. 7. c. 5.

(*b*) 13 Geo. 3. c. 78. s. 7.

(*c*) 13 Geo. 3. c. 78. s. 13.

† The words in Italics are different from, or additions to, the highway act.

an exception in favor of *fences*, trees, *bushes, or shrubs* in any *garden, orchard, plantation, walk* or avenue to a house, or being an ornament or shelter to the house, unless such tree, &c. should overhang the road in such a manner as to impede or annoy any carriage or person travelling there (*a*).

And it is provided, that no hedge is to be cut between the last day of September and the last day of March (*b*).

Gates. Gates erected by trustees on turnpike roads without the authority of parliament, may be removed by the magistrates. This will be fully mentioned when we come to speak of the management of the tolls. The turnpike act declares, that no door or gate of a building, park, paddock, field, or, indeed, of any inclosure, shall open into or towards the road, or any footpath belonging to it, whether it be an old or a new gate, unless the hanging post be so far from the centre of the road as that the gate, when open, cannot project over any part of the road, or over any footpath. The occupier is bound, after fourteen days' notice from the surveyor, to comply with the requisitions of the act by having the gate hung outwards, or, in default, the surveyor is authorized to make the alteration. There is, however, a forfeiture of a sum not exceeding 40*s.*, which must be paid by the defaulter for his neglect; and, further, on complaint to the justices of the county or place where the neglect has been suffered, and upon conviction by the oath of one credible witness, the defaulter must pay the surveyor a sum for his expenses in the alteration, as the magistrates shall direct, and they are also empowered to fix the fine (*c*).

Stones. Persons are expressly prohibited from laying stones, timber*, straw, dung, or other things in the highway; and if, in making, scouring, or cleansing the ditches or water-courses, the soil or earth dug out should be suffered to remain in the highway so as to obstruct or prejudice it for five days after notice from the surveyor, the offender is adjudged to forfeit 10*s.*, and the same sum for laying stones, &c. as above (*d*). But, in addition to this, if any stone or timber, or any hay, straw, stubble, or other matter for the making of manure, shall be laid in the highway, within fifteen feet from any centre, on any pretence whatsoever not

(*a*) 3 Geo. 4. c. 126. s. 116.
(*b*) 3 G. 4. c. 126. s. 117.
(*c*) 3 G. 4. c. 126. s. 125.
* It had been very early decided, that a man could not, as the inhabitant of an ancient house in *C.*, prescribe to lay logs in waste places of the way before his door for fuel, leaving, nevertheless, sufficient passage for chariots, &c. The court said, that a prescription to make a nuisance could not be good, and that the prescription for the inhabitants of *C.* was not good. Cro. Jac. 446, Fowler v. Sanders. See also 2 Ro. Ab. 137, Tit. Nuisance.
(*d*) 13 G. 3. c. 78. s. 9.

tolerated by the act, and shall not be removed within six days after notice given by the surveyor, or some person aggrieved by the nuisance, the owner or possessor of the adjacent lands, or any one else, may, by order from a justice, remove the obstruction, and may dispose of the stones, &c. whatever it may be, to his own use (*a*).

Waggons, &c.

Again, to set, place, or leave waggons, carts, or other carriages, ploughs, or instruments of husbandry, in the highway, so as to hinder the free passage of the public, is an offence, and punishable by a fine of 10*s*. But a reasonable time is allowed for a waggon, &c. to load and unload, provided they stand as near the side of the highway as may be convenient (*b*).

Various prohibitions are made against annoyances by the turnpike acts. The surveyor, or some person appointed by him, is directed to remove and prevent all annoyances by filth, dung, ashes, rubbish, or other thing whatsoever; and if such be laid upon an open common, it must not be done within eighty feet of the centre of the road. There must then be a notice in writing, signed by two trustees or the surveyor, and given to the owner of the thing complained of, requiring him to remove the annoyance, which he is bound to do within twelve hours afterwards; or, if the owner be not known, such a notice must be fixed for three days on the nearest turnpike-gate; and then, if it be not removed, the surveyor may sell the thing, whatever it may be, in either of the above cases, for the benefit of the road. The surveyor is to turn any water-courses, sinks, or drains, which run into, along, or out of any turnpike road, to the prejudice of it; and he is, further, to open, scour, and cleanse water-courses, or ditches adjoining to the road, and to deepen and enlarge them at his discretion, provided the owners or occupiers of such adjoining lands neglect to do so after seven days' notice in writing. And for the charges of so doing, and of removing annoyances, the surveyor is to be reimbursed by the owners or occupiers. Upon a subsequent offence of a *like kind*, the party so offending after the removal of the annoyance, is to forfeit a sum not exceeding 5*l*. (*c*)

Pits.

Whoever digs, makes, or uses a pit for sawing timber within thirty feet of the centre of the road, unless it be enclosed from the road by a fence, shall pay a sum not to exceed 40*s*., half for the informer, half for the trustees or commissioners of the road, and the latter half is to be applied towards the repair of the road (*d*).

(*a*) 13 G. 3. c. 78. s. 10.
(*b*) 13 G. 3. c. 78. s. 11.
(*c*) 3 G. 4. c. 126. s. 114. And for the mode of recovering the forfeitures, see 3 G. 4. c. 126. s. 141.
(*d*) 4 G. 4. c. 95. s. 72.

Other nuisances punishable, (being *interruptions*) are by riding on footpaths, or causeways by the side of the road set apart for foot-passengers; leading or driving horses, asses, mules, swine, or cattle, or any carriage whatever—or any wheelbarrow, truck, sledge, or single wheel of any waggon, cart or carriage, *apart therefrom*, upon the footpath or causeway; wilfully pulling down or damaging any bridge, wall, or other building, &c. erected by trustees; by hauling or drawing timber, stone, or other thing, or causing it to be so moved, except upon wheeled-carriages; suffering such things, being principally or in part carried upon wheel-carriages, to drag or trail upon the road to the prejudice of it; by using any tipstick, joggle, or other instrument which retards the descent of a cart or carriage down hill, so as to destroy, injure, or disturb the surface of the road; by killing, slaughtering, singing, scalding, burning, dressing, or cutting up beasts, swine, calves, lambs, or other cattle on the road, or by the side of it, or in any exposed situation near it; by driving a horse or other beast upon the road carrying an iron bar or rod, basket, pannier, or anything else, if the bar, &c. project more than thirty inches from the side of the horse or beast, or in any way obstruct the passage of man or beast, or carriage travelling along the road; by a hawker, higler, gipsy, or other person, who travels with any machine, vehicle, cart or other carriage, with or without horse, mule, or ass, pitching tent, booth, stall, or stand, or encamping upon, or on the side of the road; by a blacksmith, or any one occupying a blacksmith's shop, situate near the road, with a window fronting the road, if he do not, every evening after twilight, prevent the light from shining into the road by good and close shutters; by making or helping to make any bonfires; by setting fire to, or wantonly letting off squibs, rockets, serpents, or other fireworks within eighty feet of the centre of the road; by bull-baiting, playing at foot-ball, tennis, fives, cricket, or other game upon the road, or on the side of it, or in any exposed situation near it, to the annoyance of any passenger; by leaving waggons, wains, carts, or other carriages upon the road, or the side of it without any one in the sole care of them, unless for the necessary time occupied in loading and unloading them, or in taking refreshment, and then they must be placed as near to one side of the road as they conveniently may be, with or without a horse or beast of draught harnessed to them—or, unless in case of accident, and then for no longer a time than may be necessary for the purpose of removing them; by laying timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or any thing upon the road, the side of it, or the footpaths, or causeways adjoining, to the prejudice of the road or footways, or the prejudice, annoyance, interruption, or personal danger of a passenger; by suffering water, filth, dirt, or other offensive matter to run or flow upon the road or footpaths from the adjacent houses, buildings, erections, lands or premises; by suffering pigs or swine driven

Riding on footpaths.

Driving horses.

Drawing timber, stone, &c.

Suffering them to drag.

Using tipsticks, &c.

Slaughtering cattle.

Panniers bulging out, &c.

Tents.

Blacksmiths' fires.

Bonfires.

Fireworks.

Bull baiting, foot ball playing, &c.

Leaving waggons, &c. by the road.

Laying timber, &c. on the road.

Suffering filth to run along the road.

Mischief by pigs. Leaving stones, &c.

along the road to root up or damage the road, or the fences, hedges, banks, or copse on either side of it; by leaving a stone or other thing used in blocking or stopping a cart, waggon, or carriage in going up hill upon the road *. All these offences are made punishable by a penalty not exceeding 40*s.* over and above the damages occasioned (*a*).

And by a recent act, if any person shall injure, damage, incumber, ride upon, drive upon, or otherwise use any public *footpath* or *causeway,* by the side of or adjacent to any turnpike road, to the prejudice, annoyance, interruption or personal danger of any person travelling, the offender shall be liable to the same penalties as former acts prescribe for such offences, whether such *footpath or causeway* be kept up by the *trustees of the adjoining road,* or the *inhabitants of the parish* where such *path* is, or by *any other person* (*b*).

No windmill.

The erection of windmills is forbidden within 200 yards from any part of the turnpike road, under a penalty of 5*l.* for every day the windmill shall continue. But this provision does not imply that the *re-erection,* or *continuance* of any windmill will be lawful in any case where such windmill would be a public or private nuisance by the common law (*c*).

Impounding stray cattle.

Cattle should pass and repass along the turnpike road, but ought not to linger upon it, much less to be suffered to stray. They may be impounded if found wandering about. If any horse, ass, sheep, swine, or other beast or cattle of any kind be found tethered, or wandering, straying, or lying about any turnpike road, (unless it be over a common, waste, or uninclosed ground,) the surveyor or any one else may seize and impound them in the common pound (if there be any) of the same parish, township, tithing, or place, or in any place provided or directed by the trustees or commissioners for that purpose. The cattle shall be detained till the owner pay 2*s.*, with the reasonable charges of impounding and keeping, to the treasurer, clerk, or surveyor of the road, to be applied in aid of the tolls. If the penalty and expenses be not paid within five days after the impounding, a justice of the county or place where the offence has been committed, may order the cattle to be sold, notice being given previously to the owner, or, if he be not known, notices in writing being affixed to the next toll-gates on the road nearest to the place of the impounding; and the money arising from the sale,

* Or, by damaging lamps. See post. in this chapter, wilful damage.

(*a*) 3 G. 4. c. 126. s. 121.

(*b*) 7 & 8 G. 4. c. 24. s. 16. This is a penalty for obstructing a foot-path, whether it be repairable by the trustees or not.

(*c*) 3 G. 4. c. 126. s. 127.

after deducting the penalty and expenses, shall be paid to the owner of the cattle, or, if he be not known, and there be no application for the money arising from the sale for twenty-one days, it shall be applied (the expenses being first deducted) in aid of the tolls. But no one shall pay more than 5*l.* over and above the charges of impounding for any number of cattle impounded at one time (*a*).

There are two exceptions to this power of distress, the one makes the impounding, the other, the detainer, wrongful. For, it is expressly declared, that no right of pasturage existing on the sides of turnpike roads shall be taken away; it would, therefore, be perilous for any one to impound in contradiction of such a right. Secondly, if previously to the sale of the cattle it shall appear to the justice, that the impounded beasts have escaped from any inclosure through the wilful or negligent leaving open or destruction of any gate or fence, by some person who is neither the owner, nor occupier, nor in their employ, the justice may remit the penalty (*b*). And for the punishment of pound breach, whoever releases or attempts to release from the pound any cow, horse, ass, swine or other live stock or cattle seized for the purpose of being impounded for offences against the act, may be sent to the common gaol or house of correction of the county, for a time not exceeding three calendar months, without bail or mainprise. The same penalty is awarded against such as pull down, damage, or destroy the pound or other place of confinement, or any part, or any lock or bolt belonging, or used as a fastening, and against such as rescue or release any distress or levy made under the authority of the act, until or before the cattle seized or impounded, or till the distress or levy made be discharged by due course of law, and against such as make an attempt of this kind. The course to pursue is to convict the offender before a magistrate of the county where the offence is committed, either on his confession, or on the oath of one credible witness, which oath the justice has power to administer; the justice, then, upon conviction, commits the party to prison by warrant under his hand and seal (*c*).

Encroachments on highways are prohibited*. So that the making or causing any hedge, ditch, or other fences to be made on any highway not being turnpike road†, within fifteen feet from

Encroachments forbidden.

(*a*) 4 G. 4. c. 95. s. 75.
(*b*) Ibid.
(*c*) 3 G. 4. c. 126. s. 123.

* It was said in a very old case that no lord can punish purpresture upon a highway, unless he be lord of both sides. Keilw. 141, pl. 11. Where a party encroached on the highway, and added it to his freehold, and then his heir continued the same encroachment, it was held that he might be indicted, for, although he had done no new act, the very continuance of the nuisance was a new nuisance. 2 Ro. Ab. 137, Lee v. Boothby. 2 Leon. 103, Weshbourn and Mordant's case.

† Which is protected from encroachment by distinct provisions in the turnpike act.

the centre, where the breadth of the highway does not exceed thirty feet, is visited with a forfeiture of 40*s.* to the informer for every offence; and the surveyor, who has the care of the road, may cause the hedge, &c. to be taken down, or filled up at the expense of those to whom they belong. And, further, the expenses of taking down the hedges, as well as the penalties, may be levied by any justice of the limit, upon proof made on oath, by distraining on the offender's goods and chattels according to the provisions of the (highway) act (*a*). The same penalty is awarded against all who plough*, harrow, or break up the soil of any land or ground within fifteen feet from the centre of the highway, or turn their ploughs in ploughing or harrowing the adjacent lands in or upon any of the land within that distance, provided the highway be formed and marked, or described with certainty, and that it do not exceed thirty feet (*b*).

The encroachments forbidden by the turnpike act are described rather differently. The offences are—making, or causing any dwelling house to be made, or any hedge or other fence on the road, or at the sides of it, so as to reduce its breadth, or confine its limits; filling up or obstructing any ditch at the side; making, or causing a dwelling house or other building to be made, or a hedge or other fence on any common or waste land on the side of the road within thirty feet of the centre†, if within three miles of a market town, if beyond that distance, within twenty-five feet; making any drain, gutter, sink, or watercourse across the road, or otherwise breaking up or injuring its surface; ploughing, harrowing, or breaking up the soil, or, in ploughing or harrowing the adjacent land, *turning the plough or harrow in or upon* the soil within the distances from the centre which are above mentioned, whether it be on a road already made or on one to be made; making any other encroachment on the road within

(*a*) 13 G. 3. c. 78. s. 64. And as to the recovery of penalties, s. 73. Under this 64th section a surveyor is not empowered to remove a fence upon *private grounds;* and it is for the jury to say, whether an alleged encroachment be on land which was anciently road, or upon the soil of an individual. The highway act does not say that every highway shall be 30 feet wide. 4 B. & C. 3, Lowen v. Kaye.

* So it was considered before. 6 Mod. 145.

(*b*) 13 G. 3. c. 78. s. 64.

† The legislature has defined the *centre of the road.* After a preamble, that doubts might arise as to what should be deemed the centre, it is declared, that where any matter is directed or forbidden to be done by this or any turnpike act within a certain distance of the centre of the road, that portion of ground shall be deemed to be the road which the trustees, &c. have maintained with stones, gravel, or other materials, for six months preceding any offence committed against such regulations; and the centre shall be the middle of such hard road, where a line being drawn along the road, or a point marked, an equal number of feet of hard road which have been so maintained for six months before, shall be found on each side of such line or mark. 3 G. 4. c. 126. s. 124. And see the provision against encroaching on waste land, lying by the side of the road.

such distances from the centre as above stated. For these offences, in the first place, a forfeiture of 40*s.*, payable to the informer, is incurred, to be levied by distress and sale of the offender's goods and chattels, the overplus (if any) to be rendered to him on demand. And, further, the trustees or commissioners, who have the care of the road, may cause the encroachments above forbidden to be taken down or filled up, or, in the case of any ditch being filled up or obstructed, may cause it to be opened and cleansed; such alterations to be made at the expense of the persons to whom the encroachments belong, and then, any justice of the county may, upon proof made by oath, levy the expenses attending the removal of the encroachments by distress and sale, as in the case of the penalties (*a*).

Drivers.

If the driver of *any carriage whatsoever* shall, by negligence or wilful misbehaviour, prevent or interrupt the free passage of another carriage, or of any passenger on the highway, he is to be fined a sum not exceeding 10*s.*, or not exceeding 20*s.* if he be the *owner* of the carriage, and the conviction and penalties are to take place as the act directs in other cases of misbehaviour by drivers, to which we have adverted when speaking of the user of ways (*b*). A similar provision is to be found in the turnpike regulations, only that the forfeiture is greater, the fine being a sum not exceeding 40*s.* if the driver be the offending person, and not exceeding 5*l.* if the owner be convicted (*c*).

Interruptions by wilful damage.

The wilful destruction and damage of conveniencies in highways and turnpike roads are offences of so serious a nature, and occasion so much danger and injury to the public, as to warrant us in classing them among the number of obstructions, although the mischief arising from them may not be immediate, as in most of the interruptions above pointed out. These wilful injuries have been the subjects of legislative interference, and they are visited with very exemplary punishments.

Wilful mischiefs.

Surveyors are required to secure horse and foot causeways by posts, blocks, or great stones fixed in the ground, or by banks of earth cast up, or otherwise, and thus to prevent the causeways from being broken up and spoiled by waggons or other carriages. And whoever wilfully or wantonly pulls up, cuts down, removes, or damages the posts, &c. or drives carriages upon the banks and causeways, or against their sides, or digs or casts down the banks, or breaks, damages, or throws down the stones, bricks or wood, fixed upon the parapets or battlements of bridges, shall, on complaint made to a justice of the limit, upon the oath of one credible

(*a*) 3 G. 4. c. 126. s. 118.
(*b*) 13 G. 3. c. 78. s. 61.
(*c*) 3 G. 4. c. 126. s. 132. And a similar provision is repeated in 4 G. 4. c. 95. s. 72.

witness, or on view of the justice, forfeit a sum not exceeding 5*l.*, nor less than 10*s.* and, in default of payment, shall be committed to the house of correction of the limit, there whipped, and kept to hard labour for a term not exceeding one calendar month, nor less than seven days, as the magistrate shall see fit. The same punishments are to be inflicted on such as pull down, destroy, obliterate, or deface any mile-stone or post, any graduated* or direction post or stone, which is or may be erected on any highway (*a*).

The following wilful damages are provided for by the turnpike act. These offences are, the wilfully pulling down, breaking, or injuring any table of tolls set up at a toll-gate or toll-bar on the road; wilfully or designedly defacing or obliterating any of the inscriptions, letters, figures, or marks on them; wilfully pulling up, or otherwise damaging posts, rails, or fences put up by order of the trustees or commissioners of the road, or by their surveyor, or which may hereafter be put up, to prevent accidents either by the side of the road, or near any pit or quarry used, opened, or made for getting stones, gravel, or other materials for the purposes thereof; causing damage to any bridge, arch, wall, or other building or erection set up by act of parliament on the road, on any part, or on the sides of it; casting or throwing any earth, or rubbish, or other thing into drains, ditches, culverts, tunnels, or any water course, made by authority of parliament, so as to obstruct the running or draining off of the water from the road; shovelling, scraping, gathering, or carrying away the stones, gravel, sand, or other materials, or the sludge, dirt, mire, drift, or soil from the footpath, causeway, or any part of the road, without authority from the acting surveyor†; digging, making, or using a pit for sawing timber or wood within thirty feet from the centre of the road, except it be enclosed by a fence. The perpetrator of each of these offences must forfeit a sum not exceeding forty shillings, one moiety to be paid to the informer, the other to the trustees or commissioners of the road. The latter penalty is to be applied towards the repair of the road (*b*).

Damage to turnpike gates.

It is an offence unlawfully and maliciously to throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto; or any house, building, or

* Denoting the depth of the water in the deepest part.

(*a*) 13 G. 3. c. 78. s. 53.

† Also, preventing persons from passing in any carriage; but this is not an offence of wilful damage; see ante, p. 45.

(*b*) 4 G. 4. c. 95. s. 72.

weighing engine, erected for the better collection, ascertainment, or security of any such toll. And every offence above enumerated is declared to be a misdemeanor, punishable upon conviction, as in cases of misdemeanor (*a*).

Damaging lamps.

Whoever pulls down, damages, injures, or destroys any lamps or lamp-post put up in or near the side of a turnpike road or toll-house on the road, or extinguishes the light of the lamp, shall forfeit a sum not exceeding forty shillings over and above the damage occasioned (*b*).

Other interruptions in highways.

It is an interruption for any person to occupy a street for an unreasonable time, although he be in the exercise of his ordinary calling.

A waggoner at Exeter suffered one, two, and, sometimes, three of his waggons to stand in a street before his warehouse so as to occupy (which was very commonly the case) one half of the street, so that no carriage could pass on the opposite side, the gutter being in the middle of the street. Besides this, the waggons were loaded and unloaded in the street, to the obstruction of even foot passengers. This was held to be a nuisance, and the court said, that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public (*c*). In another case, the defendant occupied a small timber yard hard by the adjoining street. Owing to the narrowness of the street, and the construction of his own premises, he had necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there, before they could be carried into his yard. Upon an indictment, he was held not to be justified in so doing (*d*). So "if an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, it is certainly a nuisance" (*e*).

The proprietor of a Greenwich stage-coach permitted his carriages to stand in the highway near Charing-cross for three quarters of an hour, taking in parcels, and waiting for passengers. It appeared, upon an indictment against him, that many other stage coaches came to the same spot, that there were sometimes six or seven in a row near the curb-stone, often two tiers, and sometimes three, that private carriages could very rarely draw up to the opposite houses, and that, there was, generally, considerable obstruction and inconvenience in passing.

(*a*) 7 & 8 G. 4. c. 30. s. 14.
(*b*) 3 G. 4. c. 126. s. 121. 7 & 8 G. 4. c. 24. s. 6.
(*c*) 6 East, 427, Rex v. Russell.
(*d*) 3 Campb. 230, Rex v. Jones.
(*e*) Id. 231, by Lord Ellenborough.

Lord Ellenborough said, the defendant must be found guilty, that the king's highway was not to be used as a stable yard, and that it was immaterial how long the practice might have prevailed, for no length of time would legitimate a nuisance. It was quite different from the practice of setting down, or taking up passengers, for that would be necessary for public convenience. The defendant was accordingly found guilty (*a*).

So, it was held in an old case, that the suffering billets to remain for a long time in the high-street after the unloading, was a punishable nuisance (*b*). Though the unloading of them would not be an offence, because of the necessity of the thing (*c*).

A person was placed upon the footway on Ludgate-hill to deliver out bills of the defendant's occupation, upon which she was indicted for a nuisance, but the court quashed the indictment, holding the matter not to be indictable (*d*).

Gates. Gates erected in highways, time out of mind, are not any nuisance (*e*). But if a new gate be so placed, although it may be opened, yet it is an obstruction. In the first case, it might be intended, that the owner of the land consented originally to the way, on condition of having the gates there, and thus, that they began by composition, or, that they had been put there upon *ad quod damnum*, and no nuisance found; but, in the latter, no such reason would exist, and great inconvenience would result from suffering them, to persons on horseback, for example, people travelling with laden horses, carts, &c. (*f*)

Wall. One Browne was presented at the justice seat for the forest of Windsor for erecting a brick wall, and so straitening the highway, and it was said, by the attorney-general, that it could not be assented * without an inquiry whether there were a sufficient passage left, for if there were not, he said, that the nuisance could not be dispensed with (*g*).

House. Again, if a house on the highway be ruinous, and likely to fall down, it is a nuisance, and the occupier, although he be tenant at will, is bound to repair, for where the danger con-

(*a*) 3 Campb. 224, Rex v. Cross.
(*b*) 2 Ro. Ab. 137.
(*c*) Ibid.
(*d*) 1 Burr. 516, Rex v. Sarmon.
(*e*) 2 Ro. Ab. 138.
(*f*) Cro. Car. 184, James v. Hayward. Sir Wm Jones, 221. S. C. Croke, J. of a different opinion, and he cited 2 E. 4. 9.
* Licensed.
(*g*) Sir Wm. Jones, 277, Browne's case.

cerns the public, they look to the occupier, and not to the estate (*a*).

Twenty years' usage of a fair or market.

If there be an acquiescence for twenty years in the using of a fair or market, the persons fairly engaged in traffic upon such an occasion shall not be convicted for a nuisance, as for obstructing the highway. If such a fair or market were illegal, the party offending might be proceeded against for usurping the franchise, but not for a nuisance (*b*).

Interruption of private ways.

Although it may not be necessary for the legislature to pass enactments for the quiet user of private ways, it is quite clear, nevertheless, that any act which prevents the grantee of a way from enjoying it as he has been accustomed, is an interruption; as, ploughing the soil of the way (*c*).

The condition of a bond was, that the obligee should have free egress, ingress, and regress out of, into, and back to a house, and the complaint was, that the outward gates had been shut. And Mr. Justice Doderidge said, that to satisfy such a permission, there ought to be a common entrance at the usual door, and that the party ought not to be compelled to enter through a hole, a backdoor, or a chimney. And if, added the learned judge, the common door should be left open, but a ditch should, notwithstanding, be made, so that the grantee could not enter without leaping, it would be a breach of the condition. So, if having given a person leave to go over land, the grantor were to meet him, and threaten him if he should proceed, this would be an interruption, and the bond (if any) would be forfeited (*d*).

So, digging trenches, tearing up the ground with carts, &c. are interruptions, if the grantee suffer impediment by such acts, as where the way is filled with water in consequence of the damage done.

If a private man have a way over the land of another by prescription or grant, the grantor has no right to make a gate across the path, and an action on the case will lie against the tort-feaser for so doing (*e*).

II. What road to be used.

II. What road passengers may take when an interruption of the way occurs.

With respect to a highway, it seems to be quite clear, that if there be any obstruction, the passengers may go over the adjoin-

(*a*) 1 Salk. 357, The Queen v. Watts.
(*b*) 4 Esp. 109, Rex v. Smith.
(*c*) 2 H. 4. 11.
(*d*) Latch. 47, Climson v. Pool.
(*e*) By Jones, J. Sir Wm. Jones, 222. Litt. Rep. 267. acc.

Highways.

ing land. They may remove any illegal, improper, or inconvenient interruption, but if the ordinary track be so dangerous as to compel them to leave the road, they may go *extra viam*, passing as nearly to the original way as possible (*a*). The defendant pleaded in trespass, that there was a highway from such a place to such a place, that the plaintiff stopped it, so as to prevent him from passing, and, therefore, that he went over the plaintiff's close, doing as little harm as he could. And this plea was held good upon demurrer; for if the way be so foul as not to be passable, the going over another man's close next adjoining may be justified (*b*). And thus it is, as it respects a *highway*, that a passage in Sir Wm. Jones is to be understood. If a man incloses, and does not make a good way, it is lawful for passengers to make gaps in his hedges to avoid the ill way, so that they do not ride farther into his inclosed grounds than is needful for avoiding the bad way (*c*).

Private ways.

But the case is quite different where a *private* way becomes foundrous or impassable, unless it be a way of necessity. *Highways* are governed by a different principle. They are for the public service, and if the usual track be impassable, it is for the general good, that people should be entitled to pass in another line (*d*). But where the grantor prescribes a specific way for the use of his grantee, it does not imply any right on his part to go to the right or to the left. The defendant pleaded, to an action of trespass, that a certain lane was so much out of repair, and overflowed with water, that he was compelled to go through the *locus in quo* as near to his said way as he possibly could, it being imminently dangerous for him to use the other way; and the court held, that his plea on this occasion could not be sustained. The plaintiff had not undertaken to provide against the overflowing of the river; it might have happened by the defendant's neglect, and there was no *general* grant of a way over the land. The plaintiff, therefore, recovered (*e*). The opinion expressed by Mr. Justice Blackstone in his Commentaries, that where a road is out of repair, he who has the right of way may go over any part of the land he pleases (*f*); and a similar passage in Comyns's Digest (*g*), seem to be entirely at variance with this decision, unless their observations could be understood as applicable to highways only. And it is now settled, that the case in Douglas is a sufficient and substantial authority for establishing the distinction between public and private ways above

(*a*) Sir Wm. Jones, 297, Henn's case. 3 Salk. 182.
(*b*) 2 Show. 28, Absor v. French.
(*c*) Sir Wm. Jones, 297. And see 1 Ro. Ab. 390, Sir Edward Duncombe's case to the same effect. Ante, p. 4. 1 Brownl. 212.
(*d*) By Lord Mansfield, Dougl. 749.
(*e*) Dougl. 745, Taylor v. Whitehead.
(*f*) 2 Bl. Com. 36.
(*g*) Com. Dig. Tit. Chimin, vol. 2. p. 298.

mentioned. For, in a subsequent case, where a defendant prescribed in a *que* estate for a private way, and justified going out of the way because it had become foundrous and impassable, the court held such pleading ineffectual, and Lord Ellenborough recognized the difference between the public and private way (*a*).

Towing paths.

It was said by Holt, C. J., that if the water of a navigable river impairs and decreases the banks, every man might, of common right, have a reasonable way in the nearest part of the field next adjoining to the river. And he likened it to the case of a foundrous way in a great open field, upon which travellers might go over the outlets of the uninclosed land next adjoining (*b*). But, as this opinion proceeded on the supposition that the public had a right to go upon the paths on the banks of rivers, and, as it has been shewn (*c*), that such a right cannot exist generally, but only by custom, the way can no longer be considered as public, and it therefore seems to follow, that this passage *extra viam* could not be justified under such circumstances in conformity with the cases on private ways just mentioned.

But we have seen, that if a person think fit to stop up an ancient road, and he assign a new one in lieu of it, it is no trespass for the parties entitled to the old way to make use of that newly set out (*d*).

Way of necessity.

An exception to the distinction laid down between public and private ways has been noticed with regard to ways of necessity. For Mr. Justice Buller, in the case so much relied on by Lord Ellenborough (*e*), observed: "If this had been a way of necessity, the question would have required consideration, but it is not so pleaded" (*f*). Whence it would appear, that, where there is no other way, the user of an outlet, in cases of accident or interruption, might still be justified.

III. Remedies.

Having shewn what are interruptions, and what road passengers may take under such circumstances, we proceed to mention more particularly the remedies which may be had in cases of obstruction, as some punishments inflicted by the highway and turnpike acts have been already presented to the notice of the reader.

To remedy the grievance of an interruption in the *highway*, the public may proceed by indictment or information * ; or they

(*a*) 4 M. & S. 387, Bullard v. Harrison. See 1 Wms. Saund. 322. (a) n. 3.
(*b*) 1 Ld. Raym. 725, Young v. ——.
(*c*) Ante, p. 24.
(*d*) Ante, p. 22, where the authorities are collected.
(*e*) Taylor v. Whitehead, Dougl. 745.
(*f*) Dougl. 749.
* But a man cannot be indicted for stopping a private way, because it concerns private interest. 14 Vin. Ab. 394, pl. 5.

may abate the nuisance, and free the passage from obstruction *. And the owner of the soil of the highway may, in addition, have redress by action. So, also, may a private person who has received particular injury by reason of the nuisance. And, in some cases, a mandamus may be obtained.

Where private ways are stopped, or interrupted, the remedies are by action, and in some cases, which will be mentioned presently, by abatement; and, if it be shewn, to the satisfaction of a court of equity, that great mischief or destruction is about to take place upon a private right of road, the party aggrieved may have relief by injunction.

Indictment. The formal proceedings in case of indictment will be found in a future page (*a*).

An indictment will lie for stopping the common way to a church. It was objected in such a case, that the suit ought to be in the ecclesiastical court, and moreover, that the damage was only private; but the objection was overruled, and the defendant put to plead, although, had the indictment alleged the stoppage of a common footway to the church *for the parishioners*, it would have been bad (*b*).

Abatement. With respect to abatement, it was always held for law, that the public might remove any impediment in a highway, as, where it was said, that one might break a hedge which severed part of the highway (*c*). The abatement need not be made so as to satisfy the plea in trespass of doing as little damage as may be, and therefore the defendant was held justified in overturning the walls of a house built across the way, although they rolled into the sea (*d*).

On an indictment for a nuisance, there is a difference in the judgment between cases where the nuisance is laid *as continuing*, and where it is merely complained of as having been done. In the former instance judgment is given, that it should be abated; in the latter, that step is not necessary. So that where the indictment charged the defendant with erecting a wall across a road, and was silent as to its continuance, the court of quarter sessions did not give judgement that it should be abated, and the court of King's Bench approved of their proceeding, since, for any thing that appeared upon the record, the

* The subject is so far interested in a nuisance on the highway, that the king himself cannot dispense with it. Sir Wm. Jones, 277. Vaugh. 339.

(*a*) Post, Ch. IX.

(*b*) 1 Ventr. 208, Thrower's case. 3 Keb. 28. S. C. See Poph. 206, Heborne's case.

(*c*) Bro. Nusance, pl. 1. See Vaugh. 340. So as to Bridges, *ib.*

(*d*) 2 Salk. 458, Lodie v. Arnold.

nuisance did not in fact exist at the time when the indictment was preferred (*a*). So, where, after the defendant's conviction for obstructing a road, the way was regularly diverted by an order of magistrates, and a certificate obtained to the effect that the new way was in sufficient repair, yet the prosecutor of the indictment, notwithstanding this, prayed the court to give judgment for the prostration of the nuisance; the application was denied, for it would have been nugatory to adjudge that to be prostrated which no longer existed. There was, moreover, an affidavit, that no obstruction remained in any part of the old road indicted which was connected with the road as newly set out under the order of the magistrates (*b*). But where a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance, down to the time of taking the inquisition, and then the judgment should be, the abatement of the nuisance. Every judgment should be adapted to the nature of the case: where the erection is the nuisance, there ought to be a demolition (*c*), but then it must appear, that such an obstruction is permanent. And the party should be commanded by the judgment to remove the nuisance at his own costs (*d*).

Action.

There are some occasions upon which *actions* may be brought for obstructing the highway. For instance, the owner of the soil of way has a right to all above and under ground, except only the right of passage for the king and his people. If, therefore, a nuisance be erected upon the road, the owner may maintain a possessory action to recover his right, and, accordingly, where the encroachment had been made by building a wall, the plaintiff was allowed to maintain ejectment. And the difficulty presented to the court, that the sheriff could not give possession of the highway, was answered by their observation, that he would give it subject to the easement (*e*).

And if a person have received a *particular* injury by reason of some obstruction on the highway, he may maintain an action on the case (*f*). As if a man fall with his horse into a ditch, and thereby receive damage by reason of some interruption (*g*), and thus show some special prejudice more than the public at large have suffered (*h*). So, where a certain highway had been used by the plaintiff for carrying his tithes home, and the defendant

(*a*) 7 Term Rep. 467, Rex v. West Riding of Yorkshire Justices. 8 Term Rep. 142, Rex v. Stead. 1 Str. 686. S. P.

(*b*) 13 East, 164, Rex v. Incledon.

(*c*) 8 Term Rep. 144.

(*d*) 14 Vin. Ab. 395.

(*e*) 1 Burr. 133, Goodtitle v. Alker.

(*f*) 27 H. 8. 27. Br. Action on the case, pl. 6. cites S. C. Co. Litt. 56. (a). 5 Rep. 73. Vaugh. 341. And see 14 H. 8. 31. But 5 E. 4. 2. is contrà, and can only be reconciled by sustaining the distinction.

(*g*) 27 H. 8. 27. by Fitzherbert, J. Co. Litt. 56. (a.)

(*h*) Cro. El. 664, Bendlows v. Kemp, cited.

obstructed his path by setting up a ditch and gate, the court held, that the action would lie, for the plaintiff had particular damage by reason of the labour and pains he was forced to take with his cattle and servants in carrying home his property by a longer and more difficult way (*a*). Again, the same doctrine prevailed, where the defendant persisted in placing logs of wood, which straitened the highway, before the doors of his ancient house, and the plaintiff in consequence turned his horse upon the blocks and fell (*b*). So it would be, although a person might with care ride safely by (*c*). So, where posts were erected in the highway, and the plaintiff complained, that his corn was spoiled by reason of the passage over his close adjoining where the corn was (*d*). So, where there was but one way to come to certain coal pits from a particular part of the county, for the owner of the coal pits must necessarily suffer a special damage beyond the rest of the king's subjects by the obstruction of this way (*e*).

However, it is observable, that the injury must be direct, and not consequential, as being delayed in a journey of importance, unless special damage be alleged (*f*).

But, for hindering a man's passage in the highway without more, case will not lie, for it is a *public* injury punishable by presentment and indictment (*g*). And there would, moreover, be a multiplicity of suits, for if one man might have an action upon such an occasion, all men might have the like (*h*). Therefore, where an action was brought against the defendant for making a ditch and erecting a pale cross in the street, it was held, by three judges against one *, that without a special grief shown by the plaintiff, an action would not lie (*i*). So where the defendant was sued for not keeping a ferry-boat across an ancient river, the court refused to entertain the action, because all the king's subjects were damnified as well as the plaintiff (*k*). Though, if special damage be alleged, the case is different. So that where a person driving three laden asses was delayed four hours in consequence of the defendant keeping a gate shut across a public highway, it was held, that an action on the case would lie (*l*).

(*a*) Tho. Jones, 156. Hart v. Basset, recognized in Willes, 73.

(*b*) Cro. Jac. 446, Fowler v. Sanders.

(*c*) Bull, N.P. 26. (a). Cro. Jac. 446.

(*d*) 1 Keb. 847, Maynell v. Saltmarsh. 1 Esp. 148, Hubert v. Groves.

(*e*) 1 Ld. Raym. 486, Iveson v. Moore. 12 Mod. 262. S. C. S. C. Com. Rep. 58. Carth. 451. 1 Salk. 15. Ca. Temp. Holt, 10. Comb. 480.

(*f*) Carth. 194. Bull, N.P. 26. (a).

(*g*) 27 H. 8. 27. 9 Rep. 113.

(*h*) 27 H. 8. 27. Co. Litt. 56. (a). 5 Rep. 73. 104.

* Clench.

(*i*) Cro. El. 664, Fineux v. Hovenden. Clench, J. said, that the stopping itself was a special prejudice to the plaintiff. S. P. Mo. 180. Noy. 120, Stone v. Wakeman.

(*k*) Comb. 180, Pain v. Partridge. Carth. 191. S. C. 3 Mod. 289. S. C. 1 Salk. 12. S. C. 1 Show. 243, 255. S. C.

(*l*) 2 Bing. 263, Greasly v. Codling.

It is, however, no bar to the plaintiff's right of action that a road has become a highway since the time when it was granted to him as an occupation way. The plaintiff was the trustee of a person to whom such a right had been granted, and the defendant obstructed the passage. On case brought, it appeared, that the public had used the way without denial for twelve years preceding the suit. And it was objected, that the plaintiff could not recover in that form, because of the merger of the private into the public right; but the court were of a different opinion. They said, if a party have a special right of way granted to him, he may rest upon that title, and need not resort to a general right, which might possibly be disputed by conflicting evidence, especially in a case like that before them, of a public right of way growing out of an occupation way (*a*).

Nevertheless, in order that a party should be enabled to bring his action under these circumstances, he must use ordinary diligence to avoid the obstruction. The defendant had put up a pole across a part of the road, being about to repair his house, and had left a free passage by another branch or street in the same direction. The plaintiff had left a public-house in the evening, and there was light enough for him to have discerned the obstruction at 100 yards' distance, but riding very hard and violently, he went against it, fell with his horse, and was much hurt. There was no evidence of the plaintiff being intoxicated. The judge told the jury, that if they were satisfied, that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find for the defendant; and they found their verdict for the defendant. The court approved of this verdict (*b*). "Two things must concur," said Lord Ellenborough, "to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." (*c*)

Where some barrows full of lime-rubbish had been placed before the defendant's door by some bricklayers in the defendant's employ, and, upon a sudden gust of wind, the plaintiff's horse was frightened, and nearly ran against a waggon, upon which the plaintiff, by *unskilful driving*, ran over another heap of rubbish, and was overturned and hurt; here the want of skill on the part of the plaintiff being the proximate cause of this accident, it was held, that he could not recover, although there certainly was a misfeasance on the part of another person (*d*).

The reader is referred to the seventh Chapter for the consi-

(*a*) 8 East, 4, Allen v. Ormond.
(*b*) 11 East, 60, Butterfield v. Forrester.
(*c*) 11 East, 61.
(*d*) 2 Taunt. 314, Flower v. Adam. And see 1 Bos. & Pul. 404, Bush v. Steinman.

deration of actions against trustees, commissioners, &c. of roads and pavements, where the general liabilities and duties of those officers will be mentioned.

Obstruction of private ways.

Abatement.

It has been observed, that there are two ways of abating a nuisance, one, by action, in which damages may be recovered, and judgment had, that the nuisance shall be removed*; or the party grieved may enter and abate the nuisance himself, by which he waives his right of action (*a*). There must be a remedy, for, in the words of Lord Coke, whensoever the law giveth any thing, it giveth a remedy for the same (*b*). But by analogy to the situation of commoners, who have no right to meddle with the soil of the waste, a person whose right of way is disturbed cannot legally interfere in that manner. Therefore, where by the rooting of a cart-wheel belonging to the owner of the land, the way was so dug and drowned, that it could not be so well used as before, and the defendant, in consequence, who had the right of way, dug a trench to let out the water, it was held, that he had done that which his privilege of way could not warrant; he had an easement, but no interest in the soil; and judgment was given against him on demurrer (*c*). Yet, if the way had been wholly denied to him, as, for instance, if he had been shut out, or if the water had so far increased as utterly to obstruct the way, the case would have been different; then he would have pleaded, that he could not use the way at all (*d*). And in this sense of *total* interruption, that passage should probably be understood where it is said, If one grant to me a way, if he dig trenches in the way to my hindrance in my way, I may fill them up again (*e*). Again, if the injury to the right of way be committed by a *stranger*, and not the owner of the soil, it seems that it may be removed by the person having the right of way, although he do meddle with the soil, according to the opinion of Kelyng, C. J. (*f*) And if there be an obstruction which can be abated without breaking up the soil, as a gate, a hedge, &c., it may be done. The passage to a private way may, therefore, be recovered by abatement, unless it be necessary to meddle with the land, and even that may be done, where the interruption has been occasioned by any other person than the owner.

Action against a freeholder.

It is clear, that the old remedy by action for obstructing a private way was generally by assise of nuisance (*g*). It lay for

* That is, when the action is by assise; in an action on the case *damages* only can be recovered. 2 Mod. 253.

(*a*) 9 Rep. 55. Sir Wm. Jones, 222.

(*b*) Co. Litt. 56. (a).

(*c*) Godb. 52, Dike and Dunston's case.

(*d*) Godb. 53.

(*e*) Cited Godb. 53.

(*f*) 1 Keb. 884.

(*g*) 2 H. 4. 11. 11 H. 4. 83., and many other authorities in the Year-books to the same effect. Bro. Nusance, pl. 37. But see 34 Ass. pl. 13. contrà, which might

him who was tenant of the freehold against a freeholder (*a*). For example, where one had a way from his meadow over the land of another (*b*). And so again, assise lay for a way from a house over the land of another (*c*); from a house to church (*d*); by a commoner for stopping the way to the waste (*e*), &c. So again, assise would have lain for straitening the way, that is, if it were totally obstructed (*f*); or if were not totally interrupted, case lay (*g*). But if either plaintiff or defendant had but an estate for years, an action on the case would lie, and not an assise (*h*). So, if the stoppage had been by a stranger, an action on the case, and not an assise, was the proper remedy (*i*). And there was a distinction again between a way in gross, and a way appendant, for an obstruction of the first, case would lie, and not assise, for the latter the proceeding by assise would have been proper (*k*); though the grant were within time of memory (*l*). And a way in gross could not be changed into a way appendant in this respect by a purchase of the land to which it was granted in gross, for it continued in gross inasmuch as the party had not the land at the time of the grant (*m*).

It was said, that if a way were stopped by a hedge or ditch, and afterwards the owner of the way died, and his heir found the way open and used it, he should have an assise if disturbed, because it would be a new nuisance (*n*). Although the land were aliened by the tort-feasor, yet if the feoffee disturbed the way, under those circumstances, the same action would lie (*o*). The remedy by *quod permittat* is now obsolete. It was, however, said by Finchden, J. that unless a way were claimed as appurtenant to some freehold, *quod permittat* would not lie for it (*p*).

Quod permittat.

The action on the case grew gradually into use, and superseded the assise of nuisance. It met at first with some opposition*, although, as we have seen, it was still in some cases the only legitimate remedy. Judgment was arrested as late as in

Action on the case.

be reconciled, if the way in question had been a way in gross. See Dy. 250. 3 Leon. 13.

(*a*) 50 E. 3. 11. Bro. Nusance, pl. 6. cites S. C. 3 Leon. 13. Noy. 112, Gamford v. Nightingale.
(*b*) 20 Ass. pl. 18.
(*c*) Ibid.
(*d*) Ibid.
(*e*) 11 H. 4. 26. Cro. Eliz. 845. Sty. 470.
(*f*) 11 H. 4. 26.
(*g*) 33 H. 6. 26.
(*h*) 3 Leon. 13.
(*i*) 33 H. 6. 26. 2 Leon. 181. cites, S. C.
(*k*) 11 H. 4. 26, by Hankford. Bro. Chim. pl. 7, cites, 20 Ass. pl. 18.
(*l*) 21 Ass. pl. 1.
(*m*) Ibid.
(*n*) 4 Ass. pl. 3.
(*o*) Ibid.
(*p*) 45 E. 3. 8.

* The court, in old times, said, that where a man could have nuisance, he should not have trespass, for he shall have the most real action. 19 H. 6. 29.

the time of Queen Elizabeth, because nuisance was not brought instead of case, for stopping a way by prescription (*a*). But soon afterwards, the authority of this case was denied, and both remedies, it was agreed, were open to the aggrieved party (*b*).

We have passed over this subject shortly, although it was once of considerable importance and fraught with much learning, because an action on the case is now the remedy always substituted for the old assise of nuisance. But it is not the only remedy for an interruption of this nature. For if one disturb me in my way with weapons, &c. trespass *vi et armis* will lie for the injury (*c*). This, however, is a grievance of very rare occurrence now, and in most cases of obstruction of ways, we shall find the action on the case to be the preferable mode of redress. One had a messuage and a way to it through the freehold of another person, and the passage was interrupted; the house was then aliened. It was held, that the alienee could bring no action for the nuisance before request (*d*).

Award. Disputes on the subject of roads are occasionally submitted to arbitration in common with other matters of litigation; in such a case it is necessary for the award to shew a title to any way which it may prescribe. And so where the defendant was directed to use another way in the room of that which he had been accustomed to, but the award failed to shew any title, it was held bad *in toto* (*e*).

Covenant. An action of covenant will lie by a tenant against his lessor for a breach of the covenant for quiet enjoyment by obstructing a way of necessity (*f*).

Injunction. Again, if a way be in danger of being obstructed or destroyed, an injunction may be obtained to restrain parties from effecting such a mischief, as in the case of the colliery waggon-road mentioned at page 16 (*g*).

Mandamus. Lastly, a mandamus may in some cases be effectually applied for. As where a railway was made under the authority of parliament, and it was declared, that the public should use it. The proprietors of the railway, who were incorporated, subsequently took it up, and a mandamus was granted, as being a more efficient remedy than an indictment in that particular case (*h*).

(*a*) Dy. 250, Yevance v. Holcomb.
(*b*) Dy. 250, n. Aston's case, cited there. Cro. Eliz. 466.* S.C. Id. 845, Cantrel v. Church. Dy. 250, n. Villet v. Parkhurst, cited, S. P.
(*c*) Bro. Action on the Case, pl. 29.
(*d*) 1 Ventr. 48, Tomlin v. Fuller.
(*e*) 2 Ch. C. T. M. 594, Harris v. Curnow.
(*f*) 3 Taunt. 24, Morris v. Edgington.
(*g*) See 3 Sw. 99.
(*h*) 2 B. & A. 646. Rex v. Severn and Wye Railway Company.

No prescription against a prescription.

It is worthy of observation, that it would be no answer for a defendant to allege a prescription to stop a way claimed by prescription. The right of way is a lawful easement, and one custom is as ancient as the other; and therefore, if one have a way to his frank-tenements, or freehold, over the land of another, it is a bad plea to say, that the defendant has always been accustomed to stop that way (*a*).

Thus, also, land cannot be appurtenant to land. Where a wharf, with all ways, &c. was demised, together with the exclusive use of certain land between high and low-water mark, but, according to the finding of a special verdict, the land itself was not demised, it was holden, that a distress for barges made upon this land so demised was illegal, because either the land was demised as appurtenant to the wharf, which could not be according to the above-mentioned principle, or the mere use of it passed as a mere privilege or easement, out of which rent could not issue, and, consequently, upon which no distress could be taken (*b*).

Rent, therefore, cannot issue out of a way, as such.

(*a*) 9 Rep. 58, Aldred's case. 17 Vin. Ab. 284.
(*b*) 8 B. & C. 141, Buszard v. Capel.

CHAPTER V.

Of the Extinguishment, Suspension, and Revival of Ways.

Highways, which have once been established as such, whether by reputation, dedication to the public, or otherwise, cannot be destroyed, as we have before said. But this general principle must be understood subject to the authority of parliament.

Again, a private person having devoted a way to general use, can on no account be suffered to resume his individual rights. But the legislature possesses, and frequently exercises the power of altering and diverting roads, of improving them, or of stopping them altogether.

Extinguishment of ways by virtue of acts of Parliament.

This jurisdiction is most commonly carried into effect under the highway and turnpike laws, and also under enclosure acts. We shall proceed first to examine these as far as they relate to the extinguishment of roads, leaving the consideration of other circumstances which go to defeat rights of way, as unity of possession, &c. for the remaining part of the chapter.

Upon the making of a new highway, the old highway is to be stopped up, and sold by the surveyor, with the approbation of two of the justices of the limit, to the owner of the adjoining land, if he be willing to purchase it, if not, to some other person, for its full value. Should, however, such old road lead to any lands, house, or place which, in the opinion of the justices, cannot be accommodated with a convenient passage from the new highway, if they find it necessary, it shall be sold subject to the right of way according to the ancient usage. In either of the above cases, the money arising from the sale shall be applied towards the purchase of the intended new highway, and the soil of the old road shall become vested in the purchaser upon compliance with the following directions: A payment or tender of the money must be made, and a certificate given by the two justices, or the chairman of the quarter sessions (if the matter be there determined), which certificate must describe the lands sold, the sum agreed for, and a direction to whom it is to be paid; and the purchaser must then take a receipt from the party entitled to receive the money by an indorsement on the back of the certificate. Nevertheless, mines, minerals, and fossils are reserved to the original owners of the new way (*a*).

(*a*) 13 G. 3. c. 78. sect. 17. But no common land shall be enclosed which lies between the fences of any old highway to be stopped up under the act. And

Again, if, upon the diverting and turning of a highway, it shall appear to the justices (who are authorized to enquire into the matter) that there are other highways within the parish, township, or places which can be diverted into the new highway without inconvenience to the public, or, indeed, into any other highway within the parish, &c. so that the charge of repairing such highways may be saved, the justices may order the unnecessary highways to be stopped up. The soil is to be sold in such manner, and subject to such restrictions, as is before mentioned; and subject also to such right of appeal by the aggrieved party as is directed by the 3d section of the 55 G. 3. c. 68. (*a*)

A *more general* (*b*) power of extinguishing unnecessary highways is awarded by a subsequent statute. For, by 55 G. 3. c. 68. s. 2. if it shall appear, upon the view of two or more justices, that any public highway, bridleway, or footway is unnecessary, any two of them may, by order, at some special sessions *, stop up and sell such unnecessary road in such ways, and subject to all the exceptions and conditions mentioned in 13 G. 3. respecting the widening and diverting of highways (*c*); except that, inasmuch as by that act the money arising from the sale would be applicable to the purchase of the new road, the produce of the road sold in this last case is to be paid to the surveyor, and applied towards the general repairs of the highways and bridleways of the parish, &c. within which the highway, bridleway, or footway so stopped up may be situate (*d*). The order must state in what parish the way is situate, must describe its length and breadth, and direct the sale as well as the stopping of it (*e*). And, further, it must be stated, that it appeared to the justices,

where the land lying between the fence of the highway, not being *common land*, shall, upon a medium, exceed thirty feet, and not extend to fifty feet in breadth, it shall not be stopped until satisfaction be made to the owner for so much as shall exceed thirty feet. If the parties cannot agree, the justices shall adjust the matter, or a jury, if it happen that, under the circumstances, a jury should be impanelled. If such land, not being common land, should exceed fifty feet for a medium, or if the old road to be diverted and turned should lie through open ground belonging to any particular person, that person, and also he who is entitled to the land between the fences on the side of the highway, shall respectively hold such land of the old highway, and pay to the owner for the use of the highway so much as shall be agreed on between the parties. If, in this latter case, the parties cannot agree, the justices, or jury, as before, shall settle it, estimating the highway as thirty feet in breadth upon an average. 13 G. 3. c. 78. s. 20. And further, no encroachment is to be made on any waste lands lying by the side of any turnpike road, being highway, but every person so encroaching or obstructing the right of passage shall continue liable to the same process and penalties as though the act had not been made. 3 G. 4. c. 126. s. 124.

(*a*) 13 G. 3. c. 78. sect. 22. For the 55 G. 3, repealed the 19th section of the 13 G. 3. as it respected appeals to the quarter sessions.

(*b*) See Cald. Ca. 228, Page v. Howard.

* That this must be the case, see post, in this chapter.

(*c*) See 13 G. 3. c. 78. s. 17., and post, Ch. VII.

(*d*) 55 G. 3. c. 68. s. 2.

(*e*) 6 B. & C. 640, Rex v. Kenyon.

on view, that the way was unnecessary. Where, therefore, the order ran thus: "We the undersigned, &c. having upon view found, *or* it having appeared to us, &c." it was held bad, and a *certiorari* was awarded for the purpose of quashing it, for the justices had no jurisdiction, not having pursued the power given them by the legislature (*a*).

Notices.

Certain notices are requisite to give effect to this order. First, a notice in the form, or to the effect of a schedule, annexed to the act*, must be affixed in legible characters at the place, and by the side of the highway, &c. from whence it is directed to be turned, diverted, or *stopped up*. This notice is also to be inserted in one or more newspapers published, or generally circulated in the county where the parish, &c. in which the way so ordered to be stopped up shall lie, for three successive weeks after the making of the order, and if there be no newspaper in circulation in that county, then the notice must be inserted in any newspaper or newspapers published or circulated in the nearest adjoining county. A like notice is to be affixed to the door of the church or chapel of every parish, &c. in which such way so ordered to be stopped up, or any part of it, shall lie, on three successive Sundays subsequent to the making of the order. Then, after the due publication of these notices, the order shall be returned to the clerk of the peace in open court, and lodged with him at the quarter sessions holden for the limit where the way which has been stopped up shall lie, next after the expiration of four weeks from the first day on which such notices shall have been published. The order shall be confirmed at the same quarter sessions, and enrolled by the clerk of the peace amongst the records of the court (*b*).

The remedy prescribed for any injury done in consequence of these orders is by appeal to the sessions. For if any way shall be

(*a*) 8 B. & C. 254, Rex v. Worcestershire Justices.

* 55 G. 3. c. 68. *Schedule A.*—Notice is hereby given, that on the day of last, an order was signed by *A. B.* and *C. D.* two of his Majesty's Justices of the Peace, in and for the county of for (if the order be for turning, diverting, and stopping up, &c. here so state it, and describe the road ordered to be turned, diverted, and stopped up; if the order be for stopping up a useless road here so state it, and describe the road ordered to be stopped up); and that the said order will be lodged with the clerk of the peace for the said county, at the general quarter sessions of the peace, to be holden at in and for the said county, on the day of next, and also that the said order will at the said quarter sessions be confirmed and enrolled, unless, upon an appeal against the same to be then made, it be otherwise determined.

(*b*) 55 G. 3. c. 68. s. 2. The statute is only *directory* as to the enrolment. And by Gibbs, C. J., speaking of the enrolment as prescribed by the 19th section of 13 G. 3.: "It is very questionable whether by the term enrolment is here meant any thing more than placing the orders among the records of the sessions; but supposing it to mean an actual transcript, the act is herein merely directory to the officers; and it cannot be that all who go that way should be rendered trespassers by the neglect of the officer to perform his duty." 5 Taunt. 640.

ordered to be stopped up or enclosed, and a new way to be set out and appropriated in lieu of it, or if any unnecessary way shall be ordered to be stopped up, any person aggrieved by such an order or proceeding, or by the enclosure of any road or highway, by virtue of any inquisition taken upon any writ of *ad quod damnum*, may appeal to the quarter sessions by giving ten days' notice in writing to the surveyor of the highways of the parish, &c. in which the way in question may be situate. This notice must be fixed to the door of the church or chapel of the parish, &c. and the quarter sessions may then hear, and finally determine the appeal (*a*).

Should no such appeal be made, or, if made, should the order and proceedings be confirmed by the court, the inclosures may be made, and the ways stopped ; the proceedings shall then be binding and conclusive on all persons whatsoever, and the new ways so to be appropriated and set out shall be for ever after public ways. But it is further provided, that no inclosure of such ways shall take place (unless in the case of stopping up useless ways as before mentioned) unless the new ways be completed, and put into good condition and repair, and so certified upon view by two justices. Such certificate shall be returned to the clerk of the peace, and enrolled by him amongst the records of the sessions next after the confirming or enrolling of the order*. After the enrolment of which order and certificate the old way is to be stopped up, and the soil of it sold according to the provisions of the 13 G. 3. before mentioned (*b*). First, as to the time of making the appeal, it is observed, that it must be at the next quarter sessions after the end of four weeks from the first day of the publication of the notices. These public notices have obviated the inconveniences of the old statute which were much complained of, and knowledge of the intended alteration being thus brought home to all persons interested in it, there has been (as suggested by Lord Ellenborough) " a revision of the clause of appeal." (*c*)

An order was made for the diverting and turning of a public footway, and some days afterwards another order was made for

(*a*) 55 G. 3. c. 68. s. 3. See post, as to the notices upon a writ of *ad quod damnum*.

* The same law laid down as to the enrolment of the order in De Ponthieu v. Pennyfeather, 5 Taunt. 634, (and which we have mentioned in note (*a*) of page 62,) is applicable also to the *certificate* of justices in this case.

(*b*) 55 G. 3. c. 68. s. 4. And see 13 G. 3. c. 78. s. 17. The 5th section of 55 G. 3. c. 68. provides, that no order or proceeding made previous to the passing of that act shall be annulled, or in any way affected, or impeached by it.

(*c*) 3 East, 153. The decisions on the old section upon this subject, *now no longer applicable*, were:—7 T. R. 81, Rex v. Staffordshire Justices. 2 East, 213, Rex v. Pembrokeshire Justices. 3 East, 151, Rex v. Staffordshire Justices. See post, Ch. VII.

the stopping up of that way. Appeals were entered against both orders, but it appeared, that the appellant was too late to impugn the first order, and it was contended, that stopping up a way was virtually included in an order for diverting and turning, and, consequently, that he was too late to appeal against the second. But the court said, that the gravamen as to the public was the stopping up, and a rule for a mandamus to the justices to enter continuances as to the latter order was made absolute (*a*).

A notice of appeal omitted to state that the appellant was aggrieved or injured by the order, and the sessions refused in consequence to hear the appeal. The court of King's Bench held their judgment right, and discharged the rule for a mandamus to the justices to enter continuances (*b*).

We have seen, that the new way must be put into good repair before the stopping up of the old. If this be not done, the orders of justices, although confirmed by the sessions on appeal, may be questioned in an action of trespass; as where the magistrates extinguished an old road, and widened another highway in different parts of it, but no new road was set out. The judges held, that the jurisdiction of the magistrates extended only to stopping up the old highway on condition of making and putting into a proper state a new way, and the increasing of the width of one way was neither diverting another old way, nor making a new one (*c*). But this setting out of the new road need not reach the whole distance from the *terminus a quo* to the *terminus ad quem*, so that where the new way adjudged by the order led into a public highway which would carry the traveller to the point to which the old road led, such order was held sufficient (*d*).

Again, orders of this nature must be made at some special sessions, and must express on the face of them that such has been the case. It was contended in a recent argument, that this provision was confined to the *diversion* of a way, because no mention was made of the special sessions in that clause which speaks of the stopping up of ways. But the court held, that the words "said justices",* would refer to the previous words, "such justices, at some special sessions,"† and that if so, the in-

(*a*) 3 M. & S. 459, Rex v. Justices of Hertfordshire.

(*b*) 5 B. & C. 431, Rex v. Justices of Essex. S. P. 7 B. & C. 678, Rex v. Justices of West Riding of Yorkshire. In this last case there was an affidavit, that the parties of Yorkshire were aggrieved by the order, but no stress was laid upon that by the court. And see 7 B. & C. 681. n. Rex v. Somersetshire Justices.

(*c*) 8 East, 394. Welsh v. Nash. See 1 East, 64. Davison v. Gill; and post. Ch. VII.

(*d*) 5 Taunt. 634. De Ponthieu v. Pennyfeather. 1 Marsh. 261. S. C.

* In the clause for stopping up.

† In the clause for diverting.

congruity which otherwise must arise, would be avoided (*a*). However, where the sessions appeared to have confirmed an order for stopping up a highway without proof of its having been made at a special sessions, the court declined to interfere by mandamus, as the sessions had decided a point which was peculiarly under their cognizance (*b*). Although, as we have just seen, if the order be removed into court by *certiorari*, and it do not appear on the face of it to have been made at a special sessions, it will be quashed. Reasonable notice of the special sessions, and of the adjournment thereof, must be given to the justices acting within the division *by the high constable, or other proper officer*, in conformity to the 62nd section of 13 G. 3. c. 78. (*c*).

There are three descriptions of notices, one at the way side, another in the newspapers, the third at the church, and four weeks from the first day of giving notice must expire before the sessions can confirm an order. It has been held, that the computation must be made from the first day on which that description of notice shall be given which is last published, and an order was quashed for neglect of compliance with this direction (*d*).

Turnpike law as to extinguishment.

Under the turnpike law, after the completion of a new road, the old way, or so much of it as the trustees or commissioners shall deem to be useless and unnecessary, shall be stopped up, and discontinued as a public highway, (unless it lead over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town, or place, lands or tenements to which the new road does not, or does not immediately lead, and which may therefore be *deemed proper* to be kept open either as a public or private way for the use of inhabitants or individuals,) and such old road shall be vested in the trustees, &c., and sold and conveyed by them for the best price. The money arising from the sale is to be applied towards the repair and maintenance of the turnpike road. Conveyances executed by the trustees, &c. and enrolled in the office of the clerk of the peace for the county, city, or place where the road may be situate, shall be good and effectual*. However, the trustees, &c. are empowered,

(*a*) 3 B. & A. 414, Rex v. Sheppard.

(*b*) 1 Chit. 164, Rex v. Justices of ——.

(*c*) Rex v. Justices of Worcestershire, 2 B. & A. 228; and post. Chap. VII. A notice signed by the chief constables, and, *under their authority*, served by a clerk to the magistrates, was held a sufficient notice, within the 62d section. 6 B. & C. 110, Rex v. Suffolk Justices. But where the notice was served by such clerk without such authority, it was deemed insufficient, for the words, "other proper officer" in the act, mean an officer of a corporation, analogous to the high constable in a hundred. 5 B. & C. 241. Rex v. Surrey Justices.

(*d*) 1 B. & C. 622, Rex v. Justices of Kent.

* See as to the validity of *conveyance* in case of the expiration or repeal of acts. Post. Ch. VII.

instead of selling in that manner, to give up to the owners or proprietors of any adjoining lands, &c. taken for the purposes of the act, any part of the old road by way of exchange according as the trustees and owners may agree (*a*). The old road is to be disposed of to some person whose land adjoins to it, or, if he shall refuse to purchase, to some other person (*b*); and should the old road lead to any lands, house, or place, which cannot in the opinion of the trustees, &c. be conveniently accommodated with a passage from the new road, it must be sold subject to the right of way according to the ancient usage. In either case, the money is to be applied towards the purchase of the new road, or in the same manner as the tolls arising on the road are applied, according to the discretion of the trustees, &c. Upon the completion of the contract, the soil of the old road shall become vested in the purchaser and his heirs; but there is a saving of all mines, minerals, and fossils to the original proprietor, as in the Highway Act (*c*). Another more recent act reserves to such owner* all mines of iron, tin, lead, copper, coal, and other minerals whatsoever, which shall be discovered in or under any land to be used for the road. He, his agents, or servants may dig for, mine, and work the same according to the manner of doing so in the place where such mines may be found, as fully as though the land were not taken, so as that no damage be done to the road in consequence (*d*).

A question has recently arisen upon the exceptive clause in the 86th section. An old way *leading to a church* was stopped up by direction of the trustees of a road in Berkshire, and they gave up to the plaintiff the soil of that old way in exchange for his lands which were occupied by the new line of road. The distance to the defendant's house, at which the inhabitants of the village were accustomed to grind their corn, was considerably increased by this stoppage, so was also the distance from the Bath road to the village, and, moreover, the houses of several parishioners became thereby much farther from the church than before. It was resolved to assert a continuing right of way, and certain trespasses were accordingly committed. The defendant's argument was, that the exceptive clause absolutely restrained the trustees from interfering with a road leading to a church; and had the early part of that clause stood by itself, there would not have been any doubt, that the order for the extinguishment of the old way would have been invalid. But the court considered, that the words, "deemed proper," must imply that a discretionary power of stopping ways resided in the trustees, although they

(*a*) 3 G. 4. c. 126. s. 86.
(*b*) Id. s. 89.
(*c*) Id. s. 88. An appeal is given by 4 G. 4. c. 95. s. 87.; and see post. Chap. VII.
* Person, body politic, corporate, or collegiate.
(*d*) 7 & 8 G. 4. c. 24. s. 18.

might lead to a church, mill, village, &c.; and that if such a discretion were to be exercised by a judge or jury, instead of trustees, it would lead to much litigation and uncertainty. The court further said, that inasmuch as the latter part of the exceptive clause enabled the trustees to turn a public into a private way, it was impossible that any other persons than the commissioners should by law be able to effect the alteration. So that the true construction of the clause would be; that a road might be stopped up, unless, 1st, it were a road of one of the descriptions specified in the act, and 2ndly, unless the trustees should deem it proper to be kept open as a public or private road (*a*).

Extinguishment by virtue of inclosure acts.

By the general enclosure act, commissioners are to set out both public and private roads before they make the several allotments. They are then empowered to stop up the old roads, but the concurrence and order of two justices of the peace, acting for the division, and not interested in the repair of the roads, must be first obtained. There may be an appeal to the sessions against their order, in like manner as if it had been originally made by the justices (*b*). The public and private ways being set out, all ways of every kind not set out shall be stopped up and extinguished, and taken as part of the lands divided and allotted. It is, however, declared, that the commissioners may not interfere with any turnpike road without the consent of the majority of the trustees assembled at some public meeting called for that purpose with ten days' notice (*c*).

It follows from these regulations, that whatever way the commissioners do not set out is extinguished. Where, therefore, a road was neither noticed nor described among those set out by the commissioners under a local enclosure act, and the operation of that act was made subject to the powers and provisions contained in the general enclosure act, the way in question was deemed to be extinguished, for the statute does not affirm another way to be set out in lieu of every old one (*d*). But the order of justices must be expressly had to warrant the extinguishment. Where the commissioners and two magistrates made and signed an order confirming a map of roads, and an old footpath had been omitted by the commissioners in preparing this map, it was held, nevertheless, that the old way was not extinguished, for here had been no express order of justices to stop the way, and this rule was considered to extend to all roads, public or private (*e*). The proviso at the end of the eighth section is therefore not confined to public roads, and thus it has been again decided in the King's

(*a*) 7 B. & C. 266, De Beauvoir v. Welch.
(*b*) 41 G. 3. c. 109. s. 8. & 10.
(*c*) Id. s. 11.
(*d*) 2 Moore, 23. White v. Reeves. 2 M. & S. 85, by Lord Ellenborough.
(*e*) 9 Price, 58, Harber v. Rand.

Bench (*a*). Commissioners were authorized by an inclosure act to stop up old roads in the parish besides those over the lands to be inclosed, provided it were not done without the concurrence of two justices, and it seemed to Bayley, J., that the clause applied both to roads which passed over *other lands* in the parish, exclusive of those to be inclosed, and not passing in any part over the lands to be inclosed, as well as to the proposed inclosures (*b*).

The eighth section ordains, that a justice and the commissioner are *finally to direct* what is to be done. Under a local inclosure act an appeal was given in all cases except where the determination of the *commissioner* should have been declared conclusive by that act, or the general inclosure act. The commissioner set out a private road, *and he and a justice* disallowed the road upon a complaint against it. Under these circumstances, it was held, that the appeal was not taken away, because it was an order of the *commissioner* alone, and the tenth section does not say that the commissioner's order shall be final (*c*).

No intrusion on the part of the public will prevent the extinguishment of a way under these circumstances, when the act has been duly complied with. So that where a public footway over crown land was omitted in the award of commissioners, but the public continued to use the way notwithstanding, it was held, that this user could not operate to hinder the extinction of the way, and that no evidence of a dedication was thereby established, since it did not appear that the crown had any knowledge of the user (*d*).

A case happened on the subject of appeal from the order of the commissioner and justices under an inclosure act which is deserving of attention here. The way was stopped under a section similar to the eighth in the general enclosure act cited above, and which, of course, gave a right of appeal to the sessions. A subsequent clause, however, enabled the party aggrieved to appeal at any time within *six months* after the cause of complaint. The commissioner did not give the notices mentioned by 55 Geo. 3. c. 68. (and, indeed, the Chief Justice declined to pronounce any opinion whether he were bound to give such notices under an act for inclosure); but the first mentioned appeal was thus rendered impracticable. For, according to the eighth section, the appeal is to be to the quarter sessions in such manner, and under such forms and restrictions as if the order had been originally made by two justices. This would be at the next sessions after the publication of certain notices; but as

(*a*) 5 B. & C. 513, Logan v. Burton.
(*b*) Id. 523, in the same case.
(*c*) 2 B. & C. 228, Rex v. West Riding Justices.
(*d*) 4 B. & C. 591, Harper v. Charlesworth. See ante, p. 13.

no notices were published at all in this case, this mode of appealing could not take place, and it was contended, that there was no appeal whatever, and that the sessions had no jurisdiction. But the court said, that the section which gave an appeal at any time within six months should not be controlled by the former, that a party might be aggrieved by the stoppage of a road whether notices were given or not, and they discharged a rule for quashing the order of sessions at which an appeal under the last-mentioned section had been heard (*a*). But upon an appeal against the inclosure of a way under a writ of *ad quod damnum**, the notices required by 55 Geo. 3. must be given. Where, therefore, the justices at sessions dismissed an appeal because proof of these notices was not offered, the court declared that they entertained no doubt upon the matter, and that it would be a perversion of the plain words of the statute to hold, that any difference existed between the stopping of a road by order of magistrates, and under this writ as far as the notice were concerned. The rule for a mandamus to enter continuances was discharged with costs (*b*).

It is worthy of observation, that the public having a vested interest in highways cannot be deprived of them except by express words. The defendant was indicted for obstructing a public way by the side of a floating harbour there. It appeared, that part of a river adjoining to a towing path had been converted into a floating harbour *by act of parliament*, and this change had made some difference in the mode of using this path, for it became subject to be used at all times of the tide, which was not so before. The statute further authorized the Bristol Dock Company to make a towing path comprising the old one, and to yield a compensation to the owner of the soil for any injury he might sustain by the enlargement of the ancient path. It was contended for the defendant that these powers extinguished the right of way. But the court gave judgment for the crown, for 1st, the right of the public at large under the prescription or custom was considered to be perfectly distinct from the power given by the legislature, and 2ndly, the compensation was by no means inconsistent with the pre-existing right in the public. Certain persons were merely furnished with an authority to render the exercise of the way more easy and beneficial (*c*). Indeed, as a towing path cannot exist any where except on the bank of a river,

(*a*) 5 B. & A. 420, Rex v. Townsend. See also 2 M. & S. 80, Rex v. Commissioners of Dean Inclosure. The court will interfere by mandamus to the commissioners under an inclosure act. 2 M. & S. 85.

* Two ways led to the same place. It was held, that one of these might be stopped up without setting out one in lieu of it. But, in general, under this writ, the condition of setting out a new way must be complied with. Amb. 296. See Vaugh. 341.

(*b*) 1 B. & A. 373, Rex v. Justices of Essex.

(*c*) 3 B. & A. 193, Rex v. Tippett.

it is not in the power of commissioners to deal with it as they would with a road, by setting out another in its place. So that, where roads and ways not set out by commissioners were declared by an inclosure act to be part of the lands allotted, the court held, that this power did not extend to an ancient towing path, and they observed, that the commissioners, upon making their allotment, did not appear to consider that path within their jurisdiction (*a*).

Extinguishment by unity of possession.

We come now to speak of the extinguishment of private roads more particularly. This subject, however, as far as it relates to the destruction of the right by virtue of acts of parliament, has been already mentioned, because the power of magistrates under the highway and turnpike laws, and also under enclosure acts, extends to private as well as public roads. But unity of possession of the close where a private way exists with the close to which such a way is appurtenant, or which gives the right of way, occasions an extinction of the road, which cannot take place in the case of public highways, and is, therefore, peculiarly incident to this kind of easement. So that if a man have a way appendant to his freehold over the land of another, and he then purchase that land, and if afterwards the same become the property of a stranger, the way is gone for ever (*b*). So, it seems, if one have a way to a wood, and the wood become united with the land over which the way is, in the same person, the right will be destroyed (*c*). One had a crossway by prescription to go to *White* acre over *Black* acre, and then he purchased *Black* acre, and subsequently enfeoffed a stranger of the latter; it was adjudged that the crossway became extinct (*d*). In these cases of extinguishment, the greater benefit drowns the less (*e*), which has, consequently, no existence (*f*). Trespass was brought for breaking and entering the plaintiff's close. By a special plea it appeared, that one *T. A.* enjoyed an unity of seisin in certain closes *A.*, *B.*, and *C.*, that a way had been immemorially used over the former to the two latter, and that *T. A.* devised two of these closes, *with the appurtenances*, to certain persons, by virtue of whose title the defendant claimed the way in question. This plea was demurred to, on the ground of there having been an extinguishment of the right, and it was contended, that, at all events, the word "appurtenances" would carry over the

(*a*) 2 B. & P. 496, Simpson v. Scales.

(*b*) 11 H. 4. 5. See 21 E. 3. 2. 21 Ass. pl. 1. Dy. 295. (b). 1 Ro. Ab. 935. Palm. 446, by Doderidge, J. Latch. 154, S. P. Poph. 168. Jordan and Ayliffe's case, cited there, argu°. There is an opinion of Vavisor, J. 11 H. 7. 25. B. seemingly to the contrary of this doctrine, but if it be understood as applying to a way of necessity, or a revival after a severance, there will be no difficulty in reconciling it with the authorities quoted.

(*c*) Bro. Chimin, pl. 13. citing, 3 H. 6. 31. Cro. El. 300, Dell v. Babthorpe.

(*d*) Noy. Rep. 119, Heigate v. Williams.

(*e*) 3 Bulst. 340.

(*f*) Latch. 153.

easement. But the court entertained no doubt upon the general question, that where the possession of two closes becomes united in one person, all subordinate rights and easements are extinguished. And with respect to the word "appurtenances," which had been so relied on at the bar, it was held, that its operation must be confined to an old existing right, and that if any right of way had passed, it must have passed as a new easement (*a*). Had the devise been, "with the way now used," it would certainly have been a devise of the closes *B.* and *C.*, with an easement newly created (*b*). So also was the opinion of Mansfield, C. J. "No doubt a right of way, like a right of common, must be claimed as appurtenant, and if either hath been extinguished by unity of possession, it will no longer pass by the name of appurtenant." (*c*)

But there is a material distinction, in respect of this manner of extinguishment by unity, between a way of necessity, and one merely enjoyed as an easement. The right does not perish in the former case. So that where a way is used to a vill, church, &c. here, although there be a unity, the right will survive of necessity. One had a way appendant to his house, and then he purchased the close where his right lay, after this, he infeoffed the plaintiff of the close, but continued to use his way, upon which the plaintiff, the feoffee, brought his action. But judgment was given against the plaintiff, inasmuch as the feoffor might lose the benefit of his house, if he were not permitted to have this road, and the distinction above mentioned was clearly recognized (*d*). So also Mr. Justice Doderidge declared, that ways are not extinct, "if they be ways of necessity, as to the church, or to the market, and so was Popham's opinion in his time." (*e*) The court, in another case, refused to allow the objection on the score of this unity, because it appeared by the plea that the way was necessary (*f*). One *W. B.* purchased a close *A.*, with a right of way of necessity to it over another close *B.*, which belonged to a stranger, and then purchased the latter close, and subsequently a third close, *C.*, adjoining to that to which the way belonged. By the last purchase, he was enabled to enter the first close without availing himself of the road as it existed before the unity of possession. He then sold the close *B.*, over which the right was originally used, to the plaintiff, and afterwards parted with the two others to the defendant, and the question was, whether the easement would continue over *B.* to the first close *A.* after the severance. The court were quite clear,

(*a*) 1 Bos. & Pul. 371, Whalley v. Tompson.
(*b*) Id. 376.
(*c*) 3 Taunt. 30.
(*d*) Ow. 121, Jorden v. Atwood.
(*e*) 3 Bulstr. 340. Noy. Rep. 84. Latch. 154. Poph. 172. Palm. 446. To the same effect, Cro. Jac. 170. 190.
(*f*) 2 Lutwy. 1489, Dutton v. Taylor.

that the way had been extinguished if claimed as a way by prescription, but they thought that it remained in this case as of necessity, and gave their judgment for the defendant in an action of trespass (*a*). And by Heath, J. "The way which it is contended for the plaintiff that the purchaser has, is through the purchaser's own land; but suppose that *B.* close had been bought by a stranger, would there not in that case have been a way of necessity to it?" (*b*)

However, in a late case a doctrine has obtained, that whenever the necessity for such a road ceases, the easement so claimed, of necessity becomes extinct. So that if such a way were claimed, it would be a good answer to shew, that there was another way which the party might use (*c*). The defendant was possessed of four closes, and enfeoffed one *G. D.* of the close in which, &c. and had no other way at the time of the feoffment to his other closes except through it, which, &c.; but by a subsequent purchase, he was enabled to approach his own property without going along this way. On trespass brought against him for using the old way, he pleaded, that at the time of the feoffment he had no other way but over the close in which, &c., and was therefore entitled to have a convenient and necessary way there. The replication was, that he had no right to have such a way, upon which issue was joined, and the court gave judgment against him (*d*).

(*a*) 5 Taunt. 311, Buckby v. Coles.
(*b*) Id. 318.
(*c*) By Park, J. 2 Bing. 85. 6 Mod. 4.
(*d*) 2 Bingh. 76, Holmes v. Goring. Notwithstanding this decision, the author hopes it will not be deemed presumptuous to say, that the arguments of the defendant's counsel upon this occasion do not seem to have been weighed as they merited. It was said for the defendant, that "*the necessity arises out of the grant, and not out of any state of facts subsequent to the grant, and therefore is not affected by any subsequent modification of property.*" It is difficult to resist this reasoning. There had been no surrender of the way by the defendant, and it seems that there cannot be any surrender of such a way by implication. Unity of possession is the foundation of this way of necessity. If one sell a close surrounded by other closes, a way to the close purchased is given to the feoffee by the law as incident to the grant. If the owner of those closes should sell all of them except the middle close, the law will reserve a way for him out of his feoffment, as of necessity. It is presumed that the feoffee on the one hand must have intended to grant the way, and on the other, that he designed to reserve or except the way out of the grant. But it has been said that this is a *new* way limited by the necessity. With great submission there does not appear to be any authority for this proposition. Even, if there were, it could hardly be said to consist with the nature of the implied grant, or with other decisions. For the way so impliedly granted or reserved, is, in terms as little ambiguous as possible, designated the old way. It is said to *remain*, and in all the authorities the way originally enjoyed is declared not to have been *extinguished*, which must have been the case if a new way had arisen by reason of the feoffment. It is said, moreover, to *pass* (that is, the old way,) as incident to the grant.

With regard to the observation in 6 Mod. that it is a good answer to say that there is another way, it clearly must mean that, if at *the time of the feoffment*, or separation of the closes which calls the way of necessity into action, there were

In 11 H. 4, 5. a *quære* is made as to the extinction of a way in gross by specialty, it being admitted, that a way by prescription would be destroyed, by unity of possession. Way in gross.

Where a common in gross *sans nombre* was granted, and the waste afterwards came to the person having that right, it was held, clearly, that such common was extinguished in order to prevent a surcharge (*a*); but this reasoning will not apply to a way, nor, indeed, even to a common in gross for a fixed number of cattle. But on the principle, that a man would have as high and perdurable an estate in the land as in the easement enjoyed upon it, possibly the way might be abolished, although in gross. And there is a rule, that the general and particular estate shall not unite in the same person. And, besides, there would be no land to the enjoyment of which it would be incident, for a way in gross respects the person only (*b*). No distinction, moreover, is observable in the authorities subsequent to the *quære* in the Year-book between ways appendant and such as are in gross.

A private way shall not be merged if the place where it is used become a public way. An objection was once taken upon this point to the right of a plaintiff to recover in trespass for obstructing his private right of way, because it appeared that the public had exercised an uninterrupted user over it for twelve years. The plaintiff claimed by virtue of a grant by deed of an occupation way, and it was contended, that however he might maintain an action of covenant against the *grantor* as upon a covenant running with the land, he could not complain of a nuisance in a public way without shewing special damage. But the court held, that he might rest upon the title derived under the deed, and that he needed not resort to a general right, which might possibly be disputed by conflicting evidence, and, especially in a case of a public right of way growing out of an occupation-way, which was the case before them (*c*). Private way not merged in public.

Neither shall a way be destroyed by an alteration in the nature Way not extinct by

another *convenient* way, the plea of a way of necessity could not be supported, as is most evident. To go farther, however, and to assert that if *any* other way existed, the original way would be lost, would be to determine against the current of all those authorities which expressly lay it down, that the party shall have a *convenient* way.

On all occasions the law recognizes the old way, like an old landmark, with great partiality, and, upon consulting the decisions, it will be found very difficult *to justify* the user of a new way under any circumstances. For the way of necessity must arise by grant; and how can an original grant be shifted to another way without the assent either of the grantor or the grantee, which must be presumed, incorrectly, as the author submits, if the doctrine in Holmes v. Goring be the right one? These observations are urged with much diffidence.

(*a*) 7 H. 6. 3. Sir Wm. Jones, 286.

(*b*) See 21 E. 3. 2.

(*c*) 8 East, 4, Allen v. Ormond.

the alteration of estate.

of the estate to which it is appendant. So that where a copyholder had a way time out of mind over the land of another copyholder, and he purchased the inheritance of his copyhold, which operated as an enfranchisement of his estate, and, of course, as an extinction of his original tenure, yet, it was considered, that the easement was not altered by the change (*a*).

Ways not devested by non-user for a time.

Ways, like commons, being collateral to the land, cannot be devested. So that a party entitled to them does not, by non-user for a time, lose his estate or interest. They are incorporeal hereditaments, and remain attached to the soil which gives the right to use them. But an adverse possession of twenty years against the proprietor of a way, as for example, by enclosing against him, will bar his right to recover in a possessory action, and the party will, in such a case, be left to his remedy by assise, or other real writ *.

Suspension of ways.

If a man having premises to which a right of way is appurtenant should take a lease of the ground where the way is, although the unity of possession here would not destroy the way, (there being no combination of the inheritances,) yet, as an independent right, it would be suspended during the term.

Revival of ways.

This subject of suspension is, however, so intimately connected with that of revivor, that we shall proceed to consider how the easement can be restored, or how it can be claimed as reviving after a temporary suspension. And, indeed, according to a late authority, it would seem, that the word, revival, is an improper term, and that the new way arises rather by the operation of a fresh grant, than the return of an old existing right.

An assise of nuisance was brought against the defendants for obstructing the way to a mill by building a house across it. It appeared, that an unity of possession had occurred, but that after the decease of the owner, the lands descended to his two daughters, and were allotted severally to them in purparty. The land on which the way was, went to the defendant's share, and the mill, &c. to the plaintiff. It *was agreed* between the two sisters that one should have the passage over the defendant's land according to the ancient right. The objection was, that such an agreement must be by deed, which the court overruled, and awarded the assise. Here the convention between the two sisters would operate on the part of her who possessed the way, as a new grant (*b*).

(*a*) 11 Vin. Ab. 140, Emson v. Williamson.

* So decided in the case of commonable rights. 2 Taunt. 156. Hawke v. Bacon. Id. 160, Creach v. Wilmot.

(*b*) 21 E. 3. 2. 21 Ass. pl. 1. Bro. Ext. pl. 15. Brooke, C. J. says, it seems to be a new way.

In a case where there was a prescription to have a necessary easement to catch fish in a several fishery, it was argued, that the right could not be revived after an unity of possession by the words, "all ways, emoluments, and hereditaments," for that the latter term, which alone could give any colour to such an opinion, must apply to such hereditaments only as were in being at the time of the grant made (*a*).

The same doctrine was subsequently laid down by Lord Chief Justice Eyre. The two closes, one where the way existed, and the other to which it was an appendancy, became the property of an individual who devised the latter with the "appurtenances," and it was contended, that the way passed under this word. But the court gave judgment against a revival of the right. Eyre C. J. observing, that the only point which could be made was, that the ancient right had been merely suspended, and had revived upon the devise taking effect. The learned judge said, that the operation of the word "appurtenances" must be confined to an old existing right, and that had any right at all passed by this devise, it must have passed as a new easement (*b*).

Of course an act of the legislature, which is competent to destroy a way, would be sufficient to revive it, if in any case it were necessary to prevent mischief likely to arise from extinguishment by unity of possession.

(*a*) In Peers v. Lucy, 4 Mod. 364.
(*b*) 1 B. & P. 371, Whalley v. Tompson.

CHAPTER VI.

Of the Repair of Ways.

I. Repair of highways.

THIS chapter will be devoted to the consideration of the repair of highways, (including turnpike-roads,) common, and private ways.

The subject will be treated of under the three following divisions:

I. Who ought to repair.

II. What roads are to be repaired.

III. How they are to be repaired.

I. Who to repair highways.

No principle is more clearly recognized, than that the parish where the highway is, ought to repair it of common right (*a*). A common law liability attaches upon such an occasion which cannot be avoided unless the charge be fixed by the fairest and most satisfactory evidence upon others. And no agreement, with any person whatsoever, can take away this burthen which the law imposes (*b*). Where, therefore, the corporation of Liverpool were charged *by virtue of a certain agreement* between them and the owner of the land over which a street (the subject of the indictment) had been built, and under which agreement they received certain monies from the occupiers for repairs, the counsel for the prosecution admitted, that he could not support a count founded upon such a contract (*c*).

Even if particular persons be made chargeable by statute to the repair of roads, and they become insolvent, the justices may cause the rest of the inhabitants to sustain their original liability in respect of such repair (*d*). So, where the inhabitants of a certain township were exempted from the repair of *new* roads by the express provisions of an act of parliament, the rest of the parish had judgment against them *ex necessitate*, since, they were bound at all events to repair these new roads (*e*).

(*a*) 1 Ventr. 90. 183. 189. 1 Ld. Raym. 725. 12 Mod. 409. 5 Burr. 2701 by Aston, J. 2 Show. 201. 2 Term Rep. 111.
(*b*) 1 Ventr. 90.
(*c*) 3 East, 86, The King v. the Mayor, &c. of Liverpool.
(*d*) 1 Ld. Raym. 725, Anon, per Holt, Ch. J.
(*e*) 2 Term Rep. 106, Rex v. Sheffield Inhabitants.

So, where the paving of a particular street was committed to the care of certain commissioners, and a fund was provided by an act of parliament for that purpose, it was held, that the parish ought, in the first instance, to see that the street was properly paved, and then seek their remedy over against the commissioners (*a*).

So, again, the inhabitants of a township, bound by immemorial usage to repair all roads within their township, were held liable, although the trustees, under a local turnpike act, were directed to make the reparation from certain funds arising by virtue of the act, for the tolls were only an auxiliary and subordinate fund. There appeared besides, in the last case, a proviso in the act, that no county, parish, township, &c. should be discharged from repair. The inhabitants might apply, after conviction, to the court against the trustees, under 13 G. 3. c. 84. s. 33 (*b*)*.

This principle of keeping up the ancient charges on lands is strictly adhered to. So that where a manor was held by the service or tenure of repairing a highway, and the manor became afterwards divided amongst several persons, each alience, whether tenant of the demesnes or services, was held liable to the whole charge, his remedy being by contribution from the others. It was held to make no difference, that the lord of the manor agreed, upon each respective alienation, to discharge the purchasers from their share of reparations; by such an agreement only the lord and those who might claim under him would be bound. Nor would there be any diversity, though the manor should come into the hands of the crown (*c*).

Where certain lands having been given to the Abbess of Barking for the repair of a way, were sold to the Abbot of Stratford, who charged *all his lands* for the repair of the way, it was contended, nevertheless, that no lands should be chargeable save such as had been originally given for the purpose. But the court adjudged that all the Abbot's lands were liable according to his covenant (*d*). The parties originally liable cannot, therefore, deliver themselves from the charge which they have once incurred.

Again, an indictment was quashed because it charged the overseers with not repairing the highway, for the remedy was considered, as a general rule, to be against the parish (*e*). So it

(*a*) 3 Campb. 222, Rex v. Inhabitants of St. George, Hanover Square.
(*b*) 2 B. & A. 179, Rex v. Netherthong Inhabitants.
* Now repealed, but the same provisions are reenacted by 3 G. 4. c. 126. s. 110.
(*c*) 1 Salk. 358, the Queen v. the Duchess of Bucklugh. 6 Mod. 150, S. C. See post. Chap. VIII.
(*d*) 4 Mod. 48, Rex v. Buckeridge.
(*e*) 12 Mod. 198, Rex v. Dixon and another.

was, where the indictment was against a division of a parish, without shewing for what reason the inhabitants were liable (*a*). And thus it is, that a parish cannot give in evidence under *not guilty* that other persons are bound to repair; such a defence must be specially pleaded, for the parish is chargeable *de communi jure* (*b*).

Exceptions to liability of parish.

Circumstances, however, which operate to relieve the parish from the general liability above mentioned, are occasionally brought forward; we shall now proceed to examine into these. By 22 H. 8. c. 5. s. 9. it was enacted, that such part and portion of the highways in every part of this realm, as well within franchise as without, as lie next adjoining to the ends of any bridges within this realm, distant from any of the said ends by the space of three hundred feet, be made, repaired, and amended as often as need shall require. This statute seems to have been only declaratory of the common law, for, in an old case, it was said, that the Abbot of Combe ought to repair the bridge, *and* the highway applying to the one end and to the other, although the soil might be in another, in order that the easement might be preserved for the people (*c*). Nevertheless, upon a recent occasion, this liability to repair ways adjoining to the ends of a bridge was denied by the West Riding of Yorkshire. It was said, that the burthen ought to lie on the parish, that the statute respected such bridges only as were then in existence, and that those who built such bridges might, probably, by immemorial usage, have been bound to repair the adjacent highway, wherefore the statute interposed, and prescribed the limit of three hundred feet: but the House of Lords affirmed the judgment of the court of King's Bench, holding clearly the liability of the county to this repair (*d*).

Lord Coke speaks to the same effect. "So it is of a highway of common right; all the *county* ought for to repair it, because that the county have their ease and passage by it, which stands with the reason of the case of the bridge, yet some may be particularly bounden to repair it as is aforesaid." (*e*)

A township may be placed in a situation similar to that of a parish by evidence that its inhabitants have, by immemorial usage, repaired *all the roads* within it. Where, therefore, there was a prescription to this effect, and but for such prescription

(*a*) 5 Burr. 2700, Rex v. Great Broughton.

(*b*) 1 Ventr. 256, Anon. See 1 Mod. 112. 3 Keb. 301. 3 Salk. 183. 1 Freem. 521. Rex v. St. Andrews, Holborn, S. C.

(*c*) 43 Ass. pl. 37, by Knivet, J. Bro. Ab. Presentment in Courts, pl. 23, 29, cites S. C. See 2 Inst. 705.

(*d*) 7 East, 588, Rex v. West Riding of Yorkshire Inhabitants. 5 Taunt. 284, S. C. 2 Dow. 1. S. C. in error.

(*e*) 13 Rep. 33.

the roads would have been repairable by the parish at large, it was held, that the inhabitants of the township were bound to repair, and that, in order to prove their allegation that other persons were liable, they ought to shew, in particular, who those persons were (*a*).

It is, however, sufficient to prove, that some other persons are liable, without pointing them out, where the indictment charges a *special prescription to repair a particular road*, and the distinction is between such a prescription, and one to repair all the roads within the township (*b*).

And if a public act of parliament should create an exemption, the particular proof is not necessary, because all are supposed to be privy to and to have cognizance of the statute (*c*). The immemorial usage must be shown where a burthen is sought to be cast upon persons against common right (*d*), and it is also necessary to prove that some repairs have been done. Although upon the indictment of a particular road, it is enough to show the prescriptive liability, without adducing evidence of the defendant's having repaired the way indicted (*e*).

We shall see presently that particular districts and hamlets may be specially subject to this charge.

One parish may be bound by prescription to repair a way within another parish (*f*); but then some *consideration* for this liability must be shown. In a case of this kind, the counsel for the defendant urged, that the land over which the highway lay might originally have been dedicated to the public *in consideration* that the stranger parish would undertake its reparation. But the court said, that the inhabitants of a parish could not bind their successors as if they were a corporation, for a burden might thereby be imposed on them beyond the benefit which they were to receive, and it was holden, that no legal consideration appeared upon which this parish could be charged. Judgement was consequently given against the parish where the highway was situated (*g*). Where, however, the road to be repaired is within a particular district of the parish, &c. or in a particular township, this objection fails. So that where the inhabitants of a particular district were charged with repair by immemorial usage, the court held, the omission of a consideration to be immaterial (*h*). The same doctrine prevailed where the in-

(*a*) 4 B. & A. 75, Rex v. Hatfield Inhabitants. See 2 B. & A. 183.
(*b*) 4 B. & A. 80, by Holroyd, J.
(*c*) By Lord Ellenborough, 3 Campb. 223.
(*d*) Andr. 276. 2 T. R. 111, by Ashhurst, J. Id. 515.
(*e*) 4 B. & A. 78.
(*f*) 12 Mod. 409, by Holt, C. J.
(*g*) 5 M. & S. 260, Rex v. St. Giles, Cambridge, Inhabitants.
(*h*) 1 B. & A. 348, Rex v. Ecclesfield Inhabitants.

habitants of the West Riding alleged that the township of Leeds in that Riding had always repaired the highway at the end of a county bridge within the township, but did not state any consideration (*a*).

A vill is liable to repair (*b*). So a hundred may be at common law (*c*).

A hamlet also within a parish may be charged by prescription. But its immemorial liability to repair must be shown, for it is not chargeable of common right (*d*). So that where the indictment stated, that part of a way situate in an extra-parochial hamlet was out of repair, and that the inhabitants of such hamlet ought to repair it, it was holden bad, for no prescription appeared, and it was not even alleged (which allegation, however, would not have been conclusive) that the hamlet did not form part of a larger district, the inhabitants of which might have been bound to repair (*e*). Again, a private person may be liable *ratione tenuræ*, by virtue of his inclosure, as we shall see presently, or by encroachment.

To sum up the matters of which we have been speaking; 1st. The parish is liable in the first instance generally. If the parish claim an exemption, they must show in particular who are liable, except it be in a case of a *particular* road. 2ndly. By immemorial usage a township, district, hamlet, &c. may be liable; but some act of reparation must be proved to have been done by such. 3dly. Should another parish be sought to be charged, some *consideration* for the burthen must be tendered in evidence.

Enclosure. Next, the parish may be released from their ordinary charge by reason of an inclosure of the land on either side of the highway. For as it sometimes happens, that a road becomes foundrous and out of repair, and consequently, that people go upon the adjacent land, it is but fair, that the owner of that land, when by the inclosing he deprives the public of this liberty and convenience, should compensate them by making a good way during the existence of the inclosure (*f*). The rule is, that if one inclose land on one side, the other side being anciently inclosed, he shall be compelled to repair all the way; but only half the way, if there should be no ancient inclosure, and, clearly, if he inclose both sides, he becomes liable to the reparation of the whole way (*g*). So, if one encroach upon the highway, as long as the encroach-

(*a*) 4 B. & A. 623, Rex v. West Riding of Yorkshire Inhabitants.
(*b*) 27 Ass. pl. 44. (21.)
(*c*) 1 Sid. 140, Rex v. Yarton Inhabitants.
(*d*) Per Rolle, C. J., Sty. 163.
(*e*) 2 B. & C. 190, Rex. v. Kingsmoor Inhabitants.
(*f*) 2 Wms. Saund. 160, (a) n. (12).
(*g*) 1 Sid. 464.

ment continues, the party making it is liable to this charge (*a*). Although, if the obligation arise by reason of tenure, it cannot be avoided by opening an inclosure, for the party is then perpetually bound (*b*). And therefore the general principle is demonstrated, that whosoever will make an inclosure must submit to the duty of amending the way (*c*).

Positive evidence too must be given of an encroachment, if the removing of such encroachment be urged as a defence; so that where the defendant removed an old arch-way, and repaired the highway adjoining several times, Heath, J., said, that there was nothing to warrant the jury in calling that an encroachment, and that the defendant by repairs done during twenty-five years, showed a sense of his own liability (*d*). Moreover, the way must be made good and perfect. It will not be sufficient to maintain it as it existed at the time of the inclosure; so that where the defendant had made a causeway reasonably sufficient for horsemen, but neither carts nor coaches could pass along it, nor meet on account of its narrowness, nor go beside the way, it was held, that the plea of not guilty was not sustained (*e*). The consequences of neglecting the repair under these circumstances are, the passengers may make gaps in the inclosures, and ride upon the land to avoid the bad road (*f*); and the court upon one occasion ordered the inclosure to be prostrated until the repair of the old path were completed (*g*). It is, however, observable, that these repairs are incurred by persons who inclose of their own accord, for there is a distinction where such inclosure is made by operation of law, or under the authority of an act of parliament, or a writ *ad quod damnum*. And, accordingly, where, under an inclosure act, a person fences in his allotment adjoining to an ancient uninclosed road, the court considered, that he was not compellable to repair (*h*). So, upon a writ of *ad quod damnum*, and inquisition thereon, Lord Hardwicke was of opinion, that the new road need not be set out by the person who sues out the writ, in his own soil; that it is sufficient, if the inquisition be executed in a fair and open manner, and that where the parish can be at no further expense in respect of the old road, the inhabitants ought for the future to repair the new. However, if the new road should lie in another parish, then the party suing

(*a*) 2 Saund. 160, by Kelynge, C. J.
(*b*) Ibid. by Kelynge.
(*c*) Sty. 364, by Roll, C. J. 1 Ro. Ab. 390. A. 2 Ld. Raym. 1170, per Holt, C. J.
(*d*) 5 Esp. 219, Rex v. Skinner.
(*e*) Cro. Car. 366, Sir Ed. Duncomb's case. 4 Vin. Ab. 503. S. C. See post, p. 87, the distinction between the case of enclosure in this respect, and the ordinary case of repair by prescription.
(*f*) Sir Wm. Jones, 296, Henn's case.
(*g*) 1 Keb. 894, Rex v. Hillarsden. See 4 B. & A. 75.
(*h*) 1 Burr. 461, Rex v. Flecknow Inhabitants.

out such writ ought to keep it in repair, and his heirs likewise, for the inhabitants of that other parish would not thereby be relieved from the repair of the old way, inasmuch as they could never have sustained the burthen of that repair (*a*).

Occupier.

The occupier of land, and not the owner, is the person liable to this charge of repair, and so it was determined on a motion for a prohibition to the Marches of Wales upon an information preferred there against the owner (*b*). Sergeant Hoskins was indicted for not paving the highway before his house; but it was not shown that he was seised of any house, nor that he dwelt there, and the court upon this quashed the indictment, for it might be that his lessee occupied the premises, who would in that case be bound to mend the road (*c*).

A private person may therefore be bound to repair a highway by reason of his *tenure*. But he cannot be held liable by prescription, unless it be in respect of some consideration, as the taking of toll, or other profit, although his ancestors have done the repairs, for the act of the ancestor cannot charge the heir without profit (*d*).

Dikes and ditches.

However, the occupier is bound to cleanse the dikes and ditches adjoining to his land without prescription. Such was the old law, and the highway act confirms it. So that if one have land adjoining to the highway, he must cleanse the ditch; but if there be other land between the road and his land, he cannot be compelled to do it except by prescription (*e*). It is declared by the statute above mentioned, that ditches, drains, or watercourses of a sufficient depth and breadth for the keeping all highways dry and free from water, shall be made and kept in good order, and that sufficient trunks, &c. shall be laid down where any cart, horse, or footways lead out of the highways into the adjoining grounds, by the occupier of such lands. Every occupier of lands adjoining, or lying near to the highway through which the water has been used to pass from such highway, is required, as often as need be, to open and keep the ditches, &c. in good order, so that the water may pass through without obstruction. A forfeiture of 10*s.* is imposed upon any person making default in these par-

(*a*) 3 Atk. 766, *ex parte* Vennor. The writ, *ad quod damnum*, was superseded for the most part by 13 G. 3. c. 78. s. 19. That section was repealed by 55 G. 3. c. 68, and the provisions of this latter statute superseded again the *ad quod damnum* writ, but it is still occasionally resorted to.

(*b*) 4 Vin. Ab. 504, Foster's case. See Palm. 389. 2 Ro. Rep. 412. But if the owner allow his land to lie fresh, he will not be excused from repair. Palm. 389.

(*c*) Godb. 400, Sergeant Hoskin's case. S. P. 1 Salk. 357, the Queen v. Watts.

(*d*) 13 Rep. 33. See Sty. 400, S. P.

(*e*) 8 H. 7. 5. by Keble. Bro. Nusance, pl. 28, cites S. C.

ticulars, ten days' notice having been previously given to him by the surveyor (*a*). Should the ditches, gutters, or watercourses in use, or which according to the preceding directions ought to be made, be insufficient to carry off the water lying upon and annoying the highway, the surveyor may, under the order of one or more magistrates, make new ditches, &c. through the lands adjoining or lying near to the highways, and they may keep them in repair and open, for which purposes the surveyors and their workmen are authorized to go upon the lands. But the surveyors must make proper trunks, &c. over the ditches and watercourses, where necessary, for the convenient use and enjoyment of the lands, and they must keep the trunks, &c. in repair. They must also compensate the owner or occupier of such lands, not being waste or common, for any damages incurred, such satisfaction to be settled and paid in the same manner directed in the case of getting materials from several or inclosed lands (*b*).

The occupier is directed by the turnpike provisions to keep his ditches in the like condition ordered by the highway act. But the penalty in case of his default is a sum not exceeding 5*l.* (*c*). The surveyor of the turnpike, or whoever may be appointed by the trustees or commissioners may cut, make or maintain drains or watercourses upon and through any lands lying contiguous to the road, and may make ditches, under the order of the trustees, &c. as they shall see fit. They may make fences, barriers, and other erections on any part of the road to prevent any flood of water, making satisfaction, nevertheless, to the owner or occupier of the lands they may make use of for cutting or building for any damages sustained, as the trustees, &c. shall think reasonable. If any difference should arise between the owner or occupier, and the trustees, &c. touching the damages, it may be settled by any two justices for the county, city, or place where the road is situate (*d*).

Where the same drains serve for the houses of a town as well as for the turnpike road, the expenses are to be equally defrayed between the trustees and the inhabitants. Thus in all cases where any gutter, drain, sink, sewer, or underdrain, under, at the sides, or near to any turnpike road shall be used as well for the conveying of water from the road, as for removing water, &c. from the houses or premises of the inhabitants of any town, &c., and there is at the same time no specific mode of repair, nor persons liable to the expenses of maintaining the same, such costs

(*a*) 13 G. 3. c. 78. s. 8.

(*b*) 13 G. 3. c. 78. s. 14. The surveyor's duty as to nuisances in respect of the stopping up of drains, &c. will be found in the next Chapter.

(*c*) 3 G. 4. c. 126. s. 113.

(*d*) 4 G. 4. c. 95. s. 67. See 1 Marsh. 429, Sutton v. Clarke, and post, Chap. VII.

shall be equally borne as is above mentioned. In order to ascertain the proportion, and recover the expenses, the surveyor of the road shall make such repairs as shall from time to time be requisite, and shall make out an account which must be produced by him to two or more justices of the county or place where the gutter, &c. may lie. The justices upon this are empowered to examine the accounts, to inquire as to the persons using the gutter, &c., and to proportion the amount to be paid by the respective parties; which being fixed and ascertained, if any person neglect or refuse to pay it, a distress may be made upon his goods and chattels by warrant under the hands and seals of two justices of the county or place where the defaulter may be resident (*a*).

Roads in two parishes.

Where one side of a road lies in one parish, and the other side in another, the obligation upon each parish is to repair *ad medium filum viæ* (*b*). There is, however, an act of parliament upon this subject, which was passed, as the preamble states, for the purpose of settling the time and manner of repairing in such cases.

By 34 Geo. 3. c. 64. where the boundaries of parishes meet in the middle of highways, (so that one side is situated in one parish, and *vice versâ*,) two justices for the riding, county, or division may, at the instance of any surveyor of a parish, issue a summons to the surveyor of an adjacent parish under these circumstances. The application must be in writing, and must state that there is a highway common to both parishes, (particularly specifying and describing it,) one side of which ought to be repaired by the one, and the other by the other parish. A plan must be annexed, and the summons shall then issue to the other surveyor together with a copy of the writing and plan*. Such last-mentioned surveyor must appear upon a day given, which is to be not more than fourteen, nor less than seven days from the date of the summons. If the parties then appear and consent, a decision is to be made on the grounds stated beneath. But if the surveyor who has been summoned do not appear, the consideration of the matter is to be adjourned for not more than twenty-one, nor less than fourteen days, the surveyor to have notice of such adjournment, and if at the expiration of that time he still make default, the case is to be gone into. The justices are required to divide the whole of the common highway, by a transverse line crossing the road, into two equal parts, or two unequal parts, as they may see fit in consideration of the soil, waters, floods, the inequality of the highway, or other circumstances. They shall then declare, adjudge, and order, that the way on both sides in one of the parts, shall be maintained and repaired by the one, and that the way in like manner in the other part shall be so kept in order by the other

(*a*) 3 G. 4. c. 126. s. 115.

(*b*) Peake, 220, Rex v. St. Pancras Inhabitants.

* Certain forms for the complaint, summons, adjudication, and plan, are prescribed by the statute before us, s. 8.

parish. They shall cause their order, a plan of the way, and their allotment to be fairly delineated on paper or parchment and filed with the clerk of the peace of the county where the highway is, and shall also cause posts, stones, or other boundaries to be set up in the highway as they shall see fit for ascertaining the division and allotment (*a*). This being done, and after the filing of the order and plan, the parishes, and their inhabitants respectively, shall be bound as of common right to maintain and repair their allotment; they may be prosecuted and indicted for neglect, and shall be subject to the provisions, regulations, and penalties of any highway act touching repair, as in the case of other roads. But they shall be discharged from all such repairs as are not within their respective allotments (*b*). The two parishes are to bear the costs of these proceedings, the same being settled and ascertained by the justices. Upon refusal or neglect to pay their respective share, it may be levied by distress and sale on the goods of any surveyor of the parish which makes default, by the authority of either of the magistrates before whom the case may have been heard, or any other justice of the county, &c. (*c*). No boundaries, however, of counties, lordships, hundreds, manors, or any other division of public or private property, nor any boundaries of parishes shall be altered or affected by the act, in any other way than for the maintenance of such particular portion of the highways as is above mentioned (*d*). And the act is confined to such highways, the repair of which belongs to parishes only. Therefore bodies politic, townships, private persons, &c. are not affected by it. But such particular bodies, &c. may place themselves under the regulations of the act in cases where they are liable to repair one side of a highway, provided that the parties bound to repair the other side consent to the arrangement, and, in that event, the proceedings above stated shall take place, and be of equal force as when parishes are concerned (*e*).

An appeal is given to either of the two parishes. They may respectively take this step by an order in vestry specially called for the purpose, and the appeal must be to the sessions holden for the county where the parishes lie next after the filing of the order and plan, and not otherwise. There the justices may affirm, quash, or amend, and allow costs to either party at their discretion, and there shall be no writ of *certiorari* to remove such order of sessions (*f*).

Roads in two counties.

If a parish be partially situate in two respective counties, and

(*a*) 34 G. 3. c. 64. s. 1.
(*b*) Id. s. 2.
(*c*) Id. s. 3.
(*d*) Id. s. 4.
(*e*) Id. s. 5.
(*f*) Id. s. 7. The act not to extend to Scotland, by s. 6.

the highways in one county be out of repair, the whole parish becomes liable (*a*). This position was denied upon one occasion, where it was holden, that the indictment was properly preferred in that county where the ruinous road lay (*b*); but this decision was overruled in a subsequent case. There the indictment charged, that a certain part of the highway situate in that part of the parish of *C.* which was in Gloucestershire, was out of repair, and that the inhabitants of all that part of the parish of *C.* which lay in *G.* were bound to repair. After a verdict for the crown, the judgment was arrested by the opinion of three judges to one*, on the ground, that the indictment should have been preferred against the whole parish, for the common law had cast the burden on the parish generally (*c*); and, as Lord Kenyon observed, "to that general rule I find no exception as to this particular case, and we cannot make an exception." (*d*)

By-laws.

It has been said, that the inhabitants of a town may make ordinances or by-laws for the reparation of the church, or a highway, without any custom (*e*), for payments, &c. (*f*) because they are necessaries to which the law has made them subject as they are a parish (*g*).

II. Repair of what highways, of fences adjoining to them, &c.

Ways which the parish have always been accustomed to repair, and public roads generally, are such highways as require reparation from the parish, township, &c. as the case may be. But it by no means follows, that every highway which the people at large may use by sufferance, or dedication, or otherwise, is therefore a subject for repair under the general rule above stated. The burthen of reparation shall not be cast upon the parish unless they *acquiesce* under such circumstances, or unless there be an act of parliament. The county may stop the progress of a bridge by indictment, but the parish cannot prevent the opening of a road, nor obstruct the public use of it. Supposing that an occupation way under an inclosure act should become convenient for passage, it would be most unjust that the cost of maintaining it should be removed from the persons to whom the use of it was at first assigned, and cast upon the parish. And so it was determined in the case of a private road which commissioners had set out under the provisions of a local act, and which the public had used for several years without interruption as a carriage way (*h*). A way

(*a*) 3 Bac. Abr. 57.
(*b*) 4 Burr. 2507, Rex v. Weston under Penyard Inhabitants.
* Mr. Just. Ashhurst, who adhered to the former decision.
(*c*) 5 Term Rep. 498, Rex v. Clifton Inhabitants.
(*d*) Id. 503. And see the observations of Buller, J. on Rex v. Cripplegate. See also Mic. 10. W. 3. cited Id. p. 500, 504. Sir Tho. Raym. 476.
(*e*) 6 Rep. 63.
(*f*) Mo. 579.
(*g*) 3 Salk. 76. And see Hob. 212.
(*h*) 4 B. & A. 447, Rex v. St. Benedict Inhabitants.

also which the public make little or no use of, there being at the same time another road leading for so short a distance round as to be almost equally convenient, need not be repaired, for it is of little consequence to the public, and it would be an immense expense to the parish. It was so held, in a case where the way to be repaired did not exceed 100 yards in length, and the court said, that if a fine were set, it could not in this instance be expended upon the highway, the charge being upon *information* (*a*). But where *an act of parliament* makes a public road, the adoption on the parish is not wanted, and their liability to repair attaches, and so it was decided upon an indictment for not repairing a highway in the parish of St. Pancras (*b*).

By the order of trustees under a local act, a road was carried through the middle of a church-yard, and they caused a wall to be built at their sole expense on each side of the diverted road which they repaired for twenty years. A rule was then obtained for a mandamus calling upon them to show cause why they should not continue these repairs, and the court held, that as no clause had been inserted in the act throwing the onus of repair upon the trustees, they could not be made liable by implication (*c*).

III. Highways, how repaired.

We now proceed to speak of the mode of conducting the repairs alluded to; of the obtaining of materials for the purpose; of the statute duty imposed in respect of these reparations; and of the composition upon such occasions.

It has been said, that if a man be bound by prescription to repair a way, he is not compelled to put it in better condition than it has been in time out of mind before (*d*). And it has been held, in accordance with this principle, that a parish cannot be indicted for suffering a highway to be so muddy and narrow that people can hardly pass along it (*e*). This, however, is now remedied by the highway act. But, at common law, neither ways nor bridges need be widened beyond their original limits. And, if this be so, one is thus, as we have seen, under a less obligation than in the case of an inclosure by him of the adjoining land, for he would then be under the necessity of making a perfect road (*f*).

1. Proceedings to compel repair.

The legislature has especially pointed out the course to be pursued when a highway is out of repair. It is the duty of every surveyor to inform any two or more justices of the county, &c. upon oath, of all highways, bridges, causeways, or pavements upon highways, which may be from time to time in want of re-

(*a*) Say. Rep. 92. Rex v. Steyning Inhabitants.
(*b*) 5 D. & R. 497, Rex v. Lyon.
(*c*) 2 Term Rep. 232, Rex v. Commissioners of Llandilo district.
(*d*) 6 Mod. 163. 1 Salk. 359.
(*e*) 2 Ld. Raym. 1169. The Queen v. Stretford Inhabitants.
(*f*) Post, Ch. VIII.

pair, and which ought to be repaired by any person or bodies politic or corporate, by virtue of any grant, tenure, limitation, or appointment of any charitable gift, or otherwise howsoever. The justices are, in consequence, to limit a time for the repair, of which the occupier of the lands or tenements liable to the burthen, or the body politic, &c. chargeable, shall have notice from the surveyor. Then, if the repairs be not effectually made within the time limited, the justices in question are required to present such highways, &c. so out of repair, together with the person or corporation liable to repair the same, at the next general quarter-sessions for the limit wherein the highways may be. The justices at the sessions may, if they see cause, direct the prosecution to be carried on at the general expense of the limit, and to be paid out of the general rates within the same (*a*). The justices, moreover, at their special sessions, held by virtue of the act, may direct, by writing, under their hands and seals, such highways within their jurisdiction which most need repair, to be first amended, (turnpike roads excepted,) and the time and manner of the reparation may be ordered. The respective surveyors, each within his liberty, are required to proceed upon this order, if such be made (*b*).

With regard to the presentments, it is declared, that every justice of assize, of the counties palatine of Chester, Lancaster, or Durham, and of the great sessions in Wales, and every justice of the peace, shall be authorized, upon his or their own view, or upon information on oath by a surveyor*, to make presentment at their assizes or great sessions, or in the open general quarter sessions of the limit, of any highway, causeway, or bridge, which may be in need of repair, or of any other default or offence done contrary to the act. But all defects in the repair must be presented in the jurisdiction where such ways lie, and not elsewhere.

There is to be no *certiorari* in the cases of such indictments or presentments until they be traversed, and judgement be given†,

(*a*) 13 G. 3. c. 78. s. 23. In addition to this remedy there are, first, the indictment at common law, and, secondly, the presentment of a justice upon his own view. Fines imposed on persons bound *ratione tenuræ* are payable to the surveyors of the highways, and therefore it is, that the court usually give costs upon such occasions. 1 Sir Wm. Bl. 602, Rex v. Wingfield.

(*b*) 13 G. 3. c. 78. s. 25.

* He must, however, be the surveyor of the parish, or township, over which his office extends, and no other. 7 B. & C. 438, Rex v. Fylingdales Inhabitants.

† But the certiorari lies for the king, for the king does not traverse. Cowp. 78, Rex v. Bodenham Inhabitants. 2 Str. 1209, S. P. Rex v. Farewell. It is no objection to the removal of a presentment by certiorari at the instance of the prosecutor, that a private person is the real prosecutor, for the justice has avowed the presentment, the court look to him, and he is answerable for the costs. 2 Term Rep. 260, Rex v. Penderryn Inhabitants. And see post at the close of the next Chapter.

unless where the duty or obligation of repairing such highways, &c. may come in question. Such presentments, so made, shall be of the same force as if found upon the oaths of twelve men *. The justices of assize, &c. have authority to assess such fines for the default committed as they shall see fit, and the justices at the quarter sessions, or the major part of them, may, if they see just cause, direct the prosecution upon such presentments as shall be made at the quarter-sessions, to be carried on at the general expense of the limit, and paid out of the general rate within it. But there is a saving to every person affected by such presentment of any lawful traverse†, *as well with respect to the fact of non-repair,* as to the duty of repairing the highways, as might be had upon any indictment of the same, presented and found by a grand jury (*a*). Moreover, the court before whom any presentment or indictment may be tried, is empowered to award costs to the prosecutor to be paid by the defendants, if they shall appear to the court to have made a frivolous defence; and, on the other hand, costs may be awarded to the defendants, if the prosecution be deemed by the court to be vexatious (*b*). Lastly, if the inhabitants of any parish, &c. shall agree at a vestry, or public meeting, to prosecute any person by indictment for the non-repair of any highway within such parish, &c. which they apprehend such person is bound to repair, or for committing any nuisance upon the highways, or, if they shall agree at such vestry-meeting to defend any indictment or presentment preferred against them, then the surveyor of such parish, &c. may charge in his account the reasonable expenses of carrying on, or defending such prosecutions, the same being first agreed to by the inhabitants at a vestry or public meeting, or allowed by a justice within the limit where the highways may be. Such expenses, when so agreed to, or allowed, shall be paid by such parish, &c. out of the fines, forfeitures, compositions, payments, and assessments authorized to be collected and raised by virtue of the act (*c*).

Certiorari.

The *certiorari*, we have seen, survives in cases where the right to repair may come in question, and, therefore, although a parish only pleaded not guilty, it was held, that the *certiorari* had properly issued at the instance of defendants who had made

* But where a high constable makes a presentment he must go before the grand jury, and give his evidence on oath. For want of this, a presentment was quashed. 7 B. & C. 514, Rex v. Bridgewater and Taunton Canal Company.

† The traverse as to the non repair was admitted before this statute. 3 Burr. 1530, Rex v. Wiltshire Justices. 1 Sir Wm. Bl. 467. S. C. Notwithstanding that Holt, C. J. had formerly entertained a different opinion. But, even then, the other judges differed from him. Carth. 212, Rex v. Hornsey Inhabitants. The words in italics were not in the old act of 5 El.

(*a*) 13 G. 3. c. 78. s. 24.

(*b*) Id. s. 65.

(*c*) Id. s. 66.

the proper and usual affidavit that such right to repair would come under discussion (*a*).

Costs. With regard to costs, it is worthy of notice, that the statute only gives the court, "before whom the indictment is tried," power to award costs; and, thus, the defendants lost their costs upon one occasion by neglecting to apply to the judge at *nisi prius* (*b*). But it is sufficient if the judge certify upon the back of the record that the defence has been frivolous, although he do not expressly award the costs (*c*). And it makes no difference that a rule has been obtained to arrest the judgment, for the expense of going to trial would be saved to the prosecutor, if the objection were taken on demurrer (*d*). The sessions awarded costs against two persons, as prosecutors, whose names were not at the back of the indictment. The presentment was made by two other persons, constables of the hundred. The order for the payment of costs was intitled as in the prosecution of *C.* and *E.*, the real prosecutors, but it did not shew, that *C.* and *E.* were the prosecutors, nor that the indictment had been tried, and it directed that such costs should be paid to the solicitor of the parish, without saying, that the costs were to be paid to the parish. The judges held, that the sessions had done right, and that their order was valid (*e*). "Perhaps", said Lord Ellenborough, "this order might have been as well if it had awarded costs to the parish to be paid to their solicitor; but, by analogy to legal proceedings in the superior courts, where the attorney is the authorized person to receive the debt and costs, the justices have at once ordered the costs to be paid to the solicitor, as to the person probably who made the disbursements on account of the parish." (*f*)

The St. 5 W. and M. c. 11. s. 3. gives reasonable costs to the prosecutor, if he be the party grieved, or a justice of the peace, &c. or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him, &c. to prosecute or present, if the defendant prosecuting the writ of *certiorari* be convicted of the offence for which he may have been indicted. A justice of peace, whether he *present*, or *indict* a road, is entitled to costs under this statute (*g*).

(*a*) 3 M. & S. 465, Rex v. Taunton St. Mary Inhabitants.
(*b*) 5 Term Rep. 272, Rex v. Chadderton Inhabitants.
(*c*) 6 Term Rep. 344, Rex v. Clifton Inhabitants.
(*d*) 6 M. & S. 130, Rex v. St. John Margate Inhabitants. Where a defendant indicted for stopping up a public highway, removed the indictment by certiorari, giving the usual recognizances, under 5 W. & M., and died before the day in bank, his bail were held liable to pay the costs. 8 T. R. 409, Rex v. Finmore.
(*e*) 4 M. & S. 203, Rex v. Commerell and Ellis.
(*f*) 4 M. & S. 206.
(*g*) 2 Term Rep. 47, by Ashhurst, J. 5 Term Rep. 33, Rex v. Kettleworth. As to the costs of *appeal*, see post, Ch. VII.

As to the persons who may be considered as parties grieved, the prosecutor of an indictment for stopping up a footway, who appeared to have used the way before the obstruction, was held to be entitled to costs (*a*). So, persons living in the neighbourhood of a way indicted by them for non-repair, and who had been in the constant habit of using the way for many years before it became foundrous, were held to be parties grieved, being obliged to have recourse to a more circuitous route in consequence of the default. The constable of the manor (another prosecutor) within which the highway lay, was deemed to be within the act, for it concerned him, as constable, to prosecute (*b*). But, where the prosecutor did not apply for costs until two years after judgment, and there was no proof that he had used the highway which had been stopped, but, on the contrary it appeared, that, whilst it was being stopped, he declared he did not care about it, the court refused him costs as the party grieved, although the prosecution was at his instance and expense (*c*).

Fines.

The parish, &c. being convicted, the next course is to impose the fine. The great object in view is, that the way should be repaired, and, where the defendants submitted to a fine, it was said, that a *distringas in infinitum* should be awarded, until the amendment were certified (*d*). And, in the same case, the court said, that they would be certified of the repair before they would set a fine (*e*). And the court refused to quash an indictment upon an affidavit that the way was in repair; the defendant was obliged to plead guilty, and pay a nominal fine (*f*). It was moved, to levy a good fine upon a convicted parish, because a horse had broken his leg in consequence of the badness of the road, but it was urged on the other side, that the parish was very poor, and that there was an existing dispute between it and another parish, as to the repair. The court, however, imposed a fine of twenty pounds (*g*). There cannot be more than one fine upon the same indictment, the further remedy being by writ of *distringas*, or the parish, &c. may be indicted afresh, and a new fine imposed (*h*).

(*a*) 7 Term Rep. 32, Rex v. Williamson.

(*b*) 3 M. & S. 465, Rex v. Taunton St. Mary Inhabitants. See 8 Term Rep. 409. 15 East, 570.

(*c*) 1 M. & S. 267, Rex v. Incledon.

(*d*) 6 Mod. 163. The Queen v. Cluworth Inhabitants. 1 Salk. 358, S. C. See 1 Mod. 194.

(*e*) 6 Mod. 163. Which should seem to be a nominal fine. See Sir Tho. Raym. 215, Houghton's case, 2 Show. 60, where a distinction was made between submission to a verdict, and conviction by verdict; in the former case, a certificate will be sufficient, but in the latter, the sheriff must return that the way is repaired, because the verdict, being a record, must be answered by matter of record. Cro. Car. 584, Leyton's case. See, as to the judgment, 12 Mod. 409, Rex v. Ragley Parish.

(*f*) 2 Chit. Rep. 214, Rex v. Lincombe. 3 Smith, 575, Rex v. Loughton Inhabitants.

(*g*) Sty. 366.

(*h*) Rex v. Old Malton, cited, 4 B. & A. 470, n.

Contribution.

The principle of apportionment and contribution is recognized upon these occasions both at common law and by statute. There was an information for non-repair, and the defendants denied their liability, but their plea being holden bad on demurrer, the court directed them to repair by consent, and said, that should it appear that the others ought to repair part, they should refund so much as should afterwards be found due on the trial (*a*).

The highway act enacts, that no fine, &c. for non-repair, or non-appearance to any indictment or presentment for non-repair, shall be returned into the Exchequer or other court, but shall be levied by, and paid into the hands of such person residing in or near the parish, &c. where the road is, as the court imposing such fines, &c. shall order. The penalty is to be applied towards the reparation of the highways, and the person ordered to receive it, must account according to the direction of the court, or forfeit double the sum received. Further, if such fine should be levied on one or more inhabitants of the parish, &c. such persons may make a complaint to the justices at their special sessions, and the justices shall cause a rate to be made, by warrant under their hands and seals, according to the form prescribed when the statute-duty is not sufficient (*b*). Such rate shall reimburse the monies so levied to the parties complaining, and when made and confirmed by two justices, it shall be collected and levied by the surveyor of the parish, &c. so presented or indicted, who shall pay the money so levied within one month after the appointing of the rate (*c*). An indictment had been preferred against a parish, to which a plea of not guilty was put in, and the parish having been convicted, a fine was imposed. There were two districts in this parish, and one of these districts, *W.*, had not any notice of the indictment, and, notwithstanding, the fine was levied upon an inhabitant of that township. Application was made upon this to the special sessions, and a warrant was there issued for a rate on the inhabitants of *K.*, the other township, which rate having been confirmed, the court of King's Bench were moved for a mandamus to the surveyor to collect it. It was stated in the affidavits on the part of *W.*, that each district was bound to repair only such part of the highway as was situate in their respective districts. The court said, that as *W.* township had expressly sworn to their not having had notice of the indictment, and as the inhabitants of *K.* had taken the defence upon them, it ought to be considered as being substantially an indictment merely against *K.* But Buller, J., said, that the mandamus should be special, suggesting that the part of the highway which was the subject of the indictment lay wholly in *K.* township, and that the two townships were separately bound to repair their respective parcels, for thus

(*a*) 1 Keb. 277, Rex v. Yarenton Inhabitants. Upon a subsequent conviction, it may be presumed.

(*b*) See post, in this chapter.

(*c*) 13 G. 3. c. 78. s. 47.

the inhabitants of *K.* might traverse in their return either of those facts (*a*).

But such an application for reimbursement ought to be made within a reasonable time after the levy, and an interval of eight years was deemed too long, although the magistrates had been frequently requested to make the rate, and although they had ordered an account of the money expended upon repairs to be taken as lately as one year before the application to the court of King's Bench; and also, notwithstanding that the reason of their declining to make the rate proceeded on the ground that the parish at large had been improperly convicted, another district being bound to repair, as it was alledged, by immemorial custom (*b*).

Letting lands.

Lastly, provision is made for the proper letting of lands given for the purposes of repairing highways, &c. and bridges. Such are to be let at their most improved yearly value without fine, and justices, in their open sessions, may inquire into the value of the lands given, or to be given, and may direct the improvement and employment of the rents and profits according to the will of the donors, if they find that there has been any default in the performance or trust. Colleges or halls in either of the universities of England are excepted from this jurisdiction (*c*).

Repair of turnpike roads.

The trustees or commissioners of turnpike roads are authorized to contract with persons liable *ratione tenuræ*, or otherwise, for the repair of roads. They, their clerk, surveyor, or any other officer, by their order, may contract, or agree by the year, or otherwise, with any person, for the making, amending, altering, or maintaining the road, or any bridges, toll-houses, or buildings thereon, or for any other thing which trustees, &c. by any act whatsoever, are authorized to make, build, do, execute, or perform. All such contracts and agreements in writing with any workman or other person, concerning any thing to be done by virtue of any act, shall be binding upon the trustees, &c. and their successors, and upon all other parties who may sign the same, and upon the executors and administrators of such other parties. Actions and suits may be maintained on them by such trustees, &c. and damages recovered against the defaulters, and the measure of the damages shall be such sums of money as may be requisite for the due performance of the particular contract broken (*d*).

Next, contracts for the repair of any part of the road, or

(*a*) Dougl. 420, Rex v. Townshend and another. 2 Wm. Saund. 159, (n. 10.) Rex v. Leominster Inhabitants.
(*b*) 12 East, 366, Rex v. Lancashire Justices.
(*c*) 13 G. 3. c. 78. s. 52.
(*d*) 4 G. 4. c. 95. s. 78.

of any bridges thereon, may be in like manner entered into between the trustees, &c. and any person liable by tenure or otherwise, for such term as the trustees, &c. shall think proper, provided it do not exceed three years. They may contribute such sums as they may think fit out of the tolls towards such repair (*a*).

This liability by tenure is not destroyed by an alteration of the line of road. For, after a preamble, stating that doubts had been entertained upon the subject, it is declared, that every body, politic or corporate, or person liable to repair any old turnpike road, shall continue liable to the repair of any new road set out in lieu of the old, which may have been widened, altered, diverted, or turned; or of so much of such new road as shall be equal to the burthen and expense of repairing the old road, from which the parties, by the alteration, have been exonerated. If the parties be unable to agree, the road shall be viewed by two justices of the county, and the matter shall be settled by them. All presentments, indictments, and prosecutions for non-repair, shall be borne by the persons liable, as soon as the justices have made their determination. Further, if it be found convenient, that these parties should pay a gross sum, or an annual sum, instead of their repairing a proportion of the road, such justices may, with the consent of such persons, and also of the trustees, &c. obtained at a meeting, direct the same. Such order shall be conclusive, and binding on all bodies, politic or corporate, and persons whatsoever (*b*).

All paved ways or foot-paths within towns, villages, or hamlets by the sides of turnpike roads, are, nevertheless, to be kept up at the cost of the inhabitants, or other persons liable, and, therefore, unless there be a special provision for the purpose, trustees, &c. are not authorized to repair them (*c*). Otherwise, they must keep up causeways for foot-passengers as they may think proper (*d*).

The trustees and parish upon the conviction of a road are to have the fine apportioned respectively between them. Where, therefore, the inhabitants of any parish, township, or place, shall be indicted or presented for the non-repair of any highway, being turnpike road, and the court before whom such indictment, &c. shall be preferred shall impose a fine, it shall be apportioned, together with the costs and charges, between the inhabitants, &c. and the trustees, &c. according as the court shall think fit. The treasurer of the turnpike shall, by order of the court, pay the

(*a*) 3 G. 4. c. 126. s. 106.
(*b*) 4 G. 4. c. 95. s. 68.
(*c*) 3 G. 4. c. 126. s. 112. See Andr. 276, Rex v. Morton, where it was said, that inhabitants are not bound to pave, but only to repair.
(*d*) 3 G. 4. c. 126. s. 111.

sum proportioned for his road out of the money then in his hands, or next to be received by him; and their order is binding upon him. But the securities of creditors who have advanced their money upon the credit of tolls are respected in this apportionment, which is only to be made in case it should appear to the court that the money can be paid by the turnpike treasurer without endangering such securities (*a*).

Under the old act (*b*), an indictment was preferred at the assizes against a turnpike road, and removed in the court of King's Bench by *certiorari*. Upon conviction, and fine, it was contended in behalf of the trustees, that, as the act empowered the court *before whom the indictment, &c. should be preferred* to impose the fine, and to apportion it as to *the said* court should seem just, the application could only be made to the assizes, and was improperly urged in the court above. But it was held, that the same court which imposed the fine, possessed the power to apportion it (*c*).

The parish, &c. are primarily liable for non-repair, as we have shewn in a former page (*d*), but, being convicted, they may apply for relief against the trustees under this section.

Having now stated on whom the burthen of repair lies, the roads which are to be so amended, and the manner of directing and enforcing the duty in question, and having also adverted to the subject of fines, which follow as the necessary consequence of a conviction for non-repair, we proceed to the consideration of the particular assistance which each person is called upon to render towards these repairs. This leads us to the subject of statute-duty and of composition, which being considered, we shall, lastly, mention the powers which surveyors and other persons are invested with for the obtaining of materials to mend and maintain the roads.

Statute duty on highways.

The persons liable to this duty are first mentioned. They are the surveyor, and the inhabitants and occupiers of lands, tenements, woods, tithes, and hereditaments within each parish, township, or place.

One wain, two men, if lands, &c. not more than 50*l.* annually.

The proportions come next under consideration. Whoever keeps a waggon, cart, wain, plough, or tumbrel, and three or more horses or beasts of draught used to draw the same, shall be deemed to keep a team, draught, or plough, and be liable to do this duty with the same in the parish where he lives. Upon six (*e*) days in each year, (if necessary,) reckoning from Michael-

(*a*) 3 G. 4. c. 126. s. 110.
(*b*) Of 13 G. 3. c. 84, which contained the provision as to apportionment.
(*c*) 2 East, 413, Rex v. Upper Papworth Inhabitants.
(*d*) Ante, p. 76.
(*e*) See 1 Salk, 357, the Queen v. Kime.

mas to Michaelmas, he shall send *one wain,* &c. furnished according to the custom of the country, with oxen, horses, &c. for the amending of the highways, on each day and at each place which the surveyor shall appoint, together with *two able men* with the wain, &c., and such shall be his quantum of duty if his lands, &c. do not exceed 50*l.* *per annum* (*a*).

1. Occupier of 50*l.* over and above the 50*l.* last mentioned;
2. Occupier of 50*l.* in any other parish;
3. Occupier of 50*l.* not keeping a team;
to find—
1. Three horses; or,
2. Four oxen and one horse; or,
3. Two oxen and two horses.
Two able men with the above.

But the occupier of lands, &c. of *the yearly value of* 50*l.* *over and above* the 50*l.* last mentioned; and the occupier of lands of 50*l.* annual value in any other parish, &c. besides that in which he may reside; and every one who does not keep a team, draught, or plough, but occupies lands, &c. of 50*l.* annual value in any parish, &c., shall send in like manner, and for the same number of days, *one wain,* &c. furnished with not less than *three horses,* or *four oxen and one horse,* or *two oxen and two horses,* and *two able men* to each wain, &c.; and in like manner for every 50*l.* annual value respectively which every such person shall further occupy. These wains, &c. are to be employed by the surveyor in repairing the highways where the lands, &c. lie *. Next, if a person keep a team, &c., and perform duty in the parish, &c. where he resides, and do not occupy lands, &c. of 30*l.* annual value, he shall not be compellable to send more than *one labourer* with his team, &c. (*b*).

Such as keep carts, to perform statute duty, or pay.

Persons keeping *one or more carts,* and one or two horses, or beasts of draught, not having a team, must perform the statute duty with such carts, &c. for the like number of days, (six,) together with one labourer for each cart; or must pay for the lands, &c. which they occupy according to a rate, (which will be mentioned presently,) at the option of the surveyor (*c*). The surveyor, however, may call upon any person liable to send a team, &c., and *who keeps a cart* and *three or more horses,* to send such cart, &c. to perform his statute duty as the surveyor may think convenient, where the employment for teams is of such a nature as that two horses may be sufficient for one cart, or where a stand-cart with one horse may be necessary. Every such stand-cart and one horse is to be allowed by the surveyor as half a team; and every cart with two horses, as two-thirds of a team. Should a waggon be found necessary for any particular business, the surveyor may call for it. The penalty for not obeying these latter directions is such a sum as the duty so required shall bear in proportion to the forfeiture inflicted for every neglect in performing duty with a team, &c. (*d*).

(*a*) 34 G. 3. c. 74. s. 4.

* It was said in an old case, that one Frere had eight plough-lands [a plough-land was declared to be of 50*l.* per annum value by 7 & 8 Wm. 3.] and that he ought to have found eight carts for six days. He had one thousand seven hundred acres of arable and pasture, and his having pasture was held not to protect him from the duty. Tho. Raym. 186. 2 Keb. 617, Rex v. Freer, S. C.

(*b*) 34 G. 3. c. 74. s. 4.

(*c*) Id. s. 2.

(*d*) 13 G. 3. c. 78. s. 36.

But the surveyor may not consider such teams, &c. so useful as labourers; if so, each person, according to the notice sent him, must send three able men for every team so spared, or pay 4*s.* 6*d.* in lieu thereof, at the surveyor's option. Such labourers must bring shovels, spades, picks, mattocks, and other useful tools, &c. The *time* during which this labour should be performed is fixed at *eight hours* for all the persons and carriages mentioned in the act as liable to the statute duty. They may be also employed in getting and carrying materials from any other parish, &c. to be employed in the repair on which they are labouring. And if any person sending a team shall not send a sufficient labourer besides the driver, (that is, where two persons are required,) or, if either labourer or driver, or the driver of any cart, shall refuse to work according to the surveyor's directions, or if any driver shall refuse to carry proper loads, the surveyor may discharge the team, cart, or labourer, and recover from the owner of the team, &c. the forfeiture which he would have incurred by not sending a team (*a*).

Three able men if team be not wanting.

Time eight hours.

Penalties on owner for neglect of his servants.

The surveyor is to give a notice of at least four days to the persons required to perform duty, to be left at their houses or usual places of abode. This notice must specify the day, hour, and place, upon which each day's duty is called for. Such warning having been given, any person bound to send a wain, &c. with two men, shall, in default of his so doing, or of his neglect otherwise to perform the duty required by the act, forfeit 10*s.* for every such neglect (*b*).

Notice.

Penalties on defaulters.

Every person making default, by not sending one cart and man, shall forfeit 3*s.*; by not sending a cart with two horses and one man, 5*s.* For not sending a labourer *, or not performing the labour at the time and place prescribed by the act, or not paying composition money, (as we shall see by and by,) 1*s.* 6*d.* for every neglect; such forfeitures to be applied for the use of the highway, &c. The surveyor is to demand the labour fairly and equally, without partiality; and he should abate it in just proportions, when the whole duty is not required within the year. He is to proceed for the recovery of the aforesaid penalties with all convenient speed, so that they may be got in before he makes up his accounts (*c*).

By subsequent statutes, defaulters who neglect or refuse to perform their statute duty in kind, after a regular summons from the surveyor, shall forfeit twice the amount of the composition duty in respect of such work, according to the rates fixed

(*a*) 34 G. 3. c. 74. s. 2.
(*b*) 13 G. 3. c. 78. s. 37.
* So that one of the able bodied men must be *a labourer*.
(*c*) 13 G. 3. c. 78. s. 37.

by this act; and such persons must, nevertheless, perform the statute duty omitted, either in the same or following year.

Such forfeitures and arrears of statute duty to be enforced, and applied to the benefit of the highway or turnpike road to which the original neglected duty belonged, by the surveyor. They are to be recovered in the same manner as other forfeitures; and the statute duty may be enforced in other cases, under any provision of the acts in force upon that subject (*a*).

If a conviction for the non-performance of statute duty be good upon the face of it, it is a sufficient defence to an action of trespass, and the question of liability cannot be raised in that stage of the proceedings, for that is matter of defence before the justices (*b*).

Statute duty composition.

Persons liable to statute duty are, however, permitted to compound. And this composition may be voluntary on their parts, or may be compelled by the surveyor, under the authority of justices, subject to the following provisions.

Surveyor may require it.

For in all cases in which it shall be made to appear to two or more justices, &c., by the surveyors of the highways or turnpike roads, that the maintenance of the roads can be best carried on by this composition, such surveyors may require it in that manner, upon receiving an authority under the hands and seals of two justices for that purpose;—such payment to be in lieu either of the whole or part of the statute duty.

Two magistrates directed, that a composition should be paid in lieu of statute duty in kind; and they made an adjudication that the composition should be fixed at a certain rate, without ascertaining how many days' statute duty would be necessary to put the road into repair. The surveyor was not examined upon oath as to the necessity of the composition. A sum so adjudicated was levied in a township by distress, and the levy was holden illegal, for want of ascertaining the number of days as above (*c*).

Where the composition is to be collected in several townships, it ought to appear on the face of the authority that a composition is advisable in lieu of statute duty (*d*). And Mr. Justice Bayley felt strongly inclined to think, that the composition should have been shewn, *upon oath*, to be advisable, before the magistrates (*e*).

(*a*) 54 G. 3. c. 109. s. 7.
(*b*) 7 B. & C. 394, Fawcett v. Fowlis.
(*c*) 5 B. & A. 425. Stanley, Bart. v. Fielden.
(*d*) Id. 436, by Bayley, J.
(*e*) Id. 436.

The justices of the district shall fix such rates * as they shall deem reasonable, at their special sessions for the highways, held in the week next after Michaelmas † yearly, as a composition in lieu of the teams, horses, oxen, or labour, which such persons are bound, in the proportions now fixed by law, to provide and perform; and the justices are authorized and required annually to make known such rates at the special sessions, due regard being had to the actual wages of labour, and to the actual rate of hiring teams, &c. in the parish, &c. where such composition is required. Such composition shall be paid in the same manner, within the same period, and subject to the same regulations as are now by law established for enforcing the payment of compositions in lieu of statute duty, that is to say, as prescribed by the general highway act. The surveyor is required to take these compositions in fair and equal proportions where the whole of the composition may not be wanted, unless any one should prefer to pay a composition for the *whole* of his statute duty according to the rates fixed (*a*).

Rate of composition.

Further, all persons liable under any of the provisions of 34 G. 3. c. 74., and 44 G. 3. c. 52. to contribute, by a payment of money in lieu of statute duty, shall contribute in lieu of each day's duty, *for every* 20*s. of the actual annual value* of the lands, &c. which they may occupy in the parish, &c. where they reside, or in any other parish, &c. at the time of the assessment, a sum equal to *one-fiftieth part of the sum* fixed by the justices as above, as the composition for one day's labour of a cart, &c. furnished with two horses and three able men, omitting any fractional part of that sum which may not amount to one farthing ‡ (*b*). The

* By this provision it becomes *imperative* on the justices to declare the rates, and therein it differs from 44 G. 3. c. 52, which prescribed certain rates, both in case of an adjudication by justices, and also in default of their declaring a rate. That act seems to be virtually repealed, as far as regards statute duty composition, by the more recent regulations upon the subject above mentioned.

The act of 44 G. 3, is, however, not absolutely repealed, and we therefore have subjoined the rates there directed. They are as follows:

For each team, &c. each day, not more than 12*s.* nor less than 3*s.*
Carts with two horses, or beasts of draught .. 8*s.* ..... 3*s.*
Carts with one horse, or beast of draught .. 6*s.* ..... 2*s.*

These were the rates which the justices were bound to follow. Supposing that they should make no rate, the proportions were to be regulated thus:

For each team, &c. ..... 6*s.*
Carts with two horses, &c. 4*s.*
Carts with one horse, &c... 3*s.* .....c. 52. s. 2.

† The Michaelmas quarter sessions having been altered, it is declared, that the justices may do any act in their Michaelmas special sessions which they might have done in the special sessions directed to be holden in the week after the Michaelmas quarter sessions as they were originally fixed. 55 G. 3. c. 68. s. 6. But the statute which mentions a new time for holding the Michaelmas quarter sessions is only directory. 7 E. & C. 6, Rex v. Leicester Justices.

(*a*) 54 G. 3. c. 109. s. 4.

‡ From one penny to three half-pence in the pound.

(*b*) 54 G. 3. c. 109. s. 5.

persons alluded to are such as do not keep a team, &c., but occupy lands, &c. under the value of 50*l.* in the parish where they reside; and also every person keeping a team, &c., and occupying lands, &c. under 50*l.*, in any other parish, &c. than that in which he lives (*a*), and, again, persons liable to perform statute duty, by sending teams and cattle in the manner directed by the statute prescribing the duty (*b*), which we have already mentioned (*c*).

Next, with respect to persons occupying lands of a higher value than 50*l.* annually in the parish, &c. where they live, or in any other parish, but less than 100*l.* per annum, shall contribute as much again as the occupier of lands under 50*l.*; and so on progressively for every 20*s.* of actual annual value over and beyond every additional 50*l.* per annum. Such sums are to be paid in the same manner, within the same period, and subject to the same rules as are established by the general highway act for enforcing the payment of composition in lieu of statute duty (*d*)*.

Persons keeping carriages, &c.

Next, every person keeping a coach, postchaise, chair, or other wheel carriage, and not keeping a team, &c., nor occupying 50*l.* a year in the parish, &c. where he resides, shall pay to the surveyor for every horse drawing his carriage such sum as the justices may fix, under this act, as the composition for one day's work of a horse for each day's duty; or, he shall pay, at the surveyor's option, for every 20*s.* annual value of the lands, &c. he may occupy, a sum equal to one-fiftieth part of the sum fixed by the justices as the composition for one day's labour of a cart, &c. furnished with three horses and two able men, omitting any fractional part of such sum which does not amount to one farthing. These sums are to be enforced in like manner as the other compositions already spoken of (*e*). Again, if a person shall keep a draught or plough, and no carriage, he shall pay one shilling to the surveyor for every horse, or pair of oxen, or neat cattle used therein for every day's duty; or he shall pay in respect of the land, &c. which he occupies in the parish, &c. at the option of the surveyor (*f*).

Ploughs but no carriages.

Defaulters in payment of composition money.

The compositions are to be paid at the usual time fixed for receiving them, or within ten days afterwards; or, in default of payment, the surveyor may apply to a justice for the limit or dis-

(*a*) 34 G. 3. c. 74. s. 4.
(*b*) 44 G. 3. c. 52. s. 2.
(*c*) Ante, p. 96.
(*d*) 54 G. 3. c. 109. s. 5.

* This statute differs again from 34 G. 3. c. 74, in prescribing one-fiftieth part of the rate upon every twenty shillings annual value instead of one penny in the pound, as directed by that act. The stat. of 34 G. 3. stands unrepealed, but it is in some respects modified by this new provision.

(*e*) 54 G. 3. c. 109. s. 6, and see 34 G. 3. c. 74. s. 2, and the last note, which applies to this section also.
(*f*) 13 G. 3. c. 78. s. 42.

trict, who shall summon the party to appear at some special or other petty sessions for the limit, &c., to show cause before two justices why he has refused to pay. If he do not appear, or if he appear, and do not satisfy the justices that he is poor, and an object deserving of relief, the money shall be levied by distress in the same manner as the forfeitures for not performing statute duty. But if such person shall be discharged on account of his poverty, he shall be relieved from the expenses attending the summons and appearance (*a*) *.

Persons not occupying 30*l.* per annum, how relieved.

Moreover, if any person who keeps a team, &c., but does not occupy to the value of 30*l.* annually in the parish of his residence, but shall in part maintain his horses and beasts of draught used in such team upon or from lands which he occupies in one or more adjacent parishes, the justices at some special sessions may mitigate and reduce the composition duty of such person as they shall think proper (*b*).

Notice of time for compounding.

The surveyor is bound to give notice of the time of compounding, and this he must cause to be done on some Sunday in November in each year. Ten days' notice at least must be given in the church or chapel of the parish, &c.; or, if no church, &c., or if no service be performed therein, then at the most public place. The like notice must be repeated on the succeeding Sunday, of the time and place for signifying an intention to compound, and whoever, having so signified, shall pay the money at that time, or within one calendar month afterwards, shall be discharged from duty. No composition is allowable which is not paid within the time prescribed as above. The money received is to be laid out for the use of the highways. However, any new inhabitant or occupier may compound, if their occupation or residence commence after the appointed time, on condition of payment within fourteen days after such occupation or residence. Half the duty may be compounded for by any tenant or occupier intending to quit possession within six calendar months from the time fixed for the composition; and the succeeding tenant may, in like manner, compound for half the duty, or perform it in kind. And if the surveyor should receive from any one a composition for more duty than may be required from the other inhabitants and occupiers, he must repay such extraordinary composition so as to bring the duty generally to an equality (*c*).

How new inhabitants may compound.

Equality of composition.

The surveyor is to pay a proportion of the composition money to the treasurer of the turnpike. Therefore, where there has been a composition for statute duty to be done on the turnpike

(*a*) 34 G. 3. c. 74. s. 4.

* For the justices are empowered to exempt indigent persons from the payment of all such rates, assessments, or compositions. 34 G. 3. c. 74. s. 5.

(*b*) 13 G. 3. c. 78. s. 40.

(*c*) Id. s. 41.

road, the surveyor of the highways of the parish where such composition has been made, shall pay to the treasurer or surveyor of the turnpike a certain portion, according to the number of days' duty to which such person compounding was liable on the turnpike road. The money so received shall be laid out on that part of the road which lies within the parish, &c. whence it was received, and not elsewhere. Should the surveyor neglect or refuse this payment, within twenty days after he shall have received the same, upon demand of the treasurer or surveyor of the road, it shall be recovered against him by distress, in like manner as penalties, &c. are authorized to be levied under the act (*a*).

Surveyor to pay turnpike treasurer a portion of the composition money.

Penalty on surveyor.

Lastly, it is observable, that the justices shall, if they shall deem it right, direct this statute duty to be performed in kind; so that there is an absolute discretionary power vested in either the surveyor or the justices to enforce the performance of this burthen in either way, with certain exceptions to which we shall presently advert. So that, if it shall appear to the justices at their special sessions to be held in the week following the Michaelmas quarter sessions, or at any other special or petty sessions held within the limits of any parish, &c., that from the directions given as to the performance of and compounding for statute duty there may be a difficulty in procuring the necessary carriages, or a sufficient number of labourers for the repair, &c., without paying extravagantly for the same, the justices may direct the team duty, or so much of it as they shall think fit, to be performed in kind, within every such parish, &c. Except in respect of such teams as belong to persons not occupying land, &c. of 30*l.* annual value (*b*).

Justices may direct duty to be performed in kind.

Teams belonging to occupiers under 30*l.* annual value *excepted.*

The justices may likewise order all such persons * as gain their living by daily labour, or such part of them as they shall think fit, to perform six days' labour upon the road in kind, either by themselves or other sufficient labourers, (should so many days' duty be required,) upon being paid the usual wages given to labourers in such parish, &c. (*c*)

Labourers to do duty in kind.

In case part only of such teams or labourers be wanting, the justices may order it in some given proportion, as one half, third, or fourth part; and then the persons liable are to be selected by lot. For the surveyor shall, at a public vestry for the parish, &c., put the names of all the persons liable to send teams into one hat or box, and such as are liable to perform labour into another hat or box, and then some inhabitant present shall draw out such number from each as shall be equal to the proportion

If part of teams, &c. only be required, to be determined by *lot.*

(*a*) 13 G. 3. c. 78. s. 44.
(*b*) 34 G. 3. c. 74. s. 6.
* That is, such as are liable to duty.
(*c*) 34 G. 3. c. 74. s. 6.

ordered by the justices. Such persons shall perform the duty for the year in kind. Should there be a similar order in the next year, the names drawn in the preceding shall not be put into the hats or boxes. And in every succeeding year, such regulation shall be observed by the surveyor, as to render the duty as equal as possible. This order supersedes the power of compounding, and is in force until discharged or varied at some subsequent special sessions to be held in the week next after the Michaelmas quarter sessions (*a*).

Order of justices suspends the power of compounding while it lasts.

But in order to prevent inconvenience to inhabitants as far as possible, in the execution of this duty in kind, it is provided, that the inhabitants of any parish, &c. may, at some vestry, or public meeting to be held pursuant to this act *, appoint three months in every year, when no statute duty shall be called for, —one month in spring, to be called the *seed month*, one month in the summer for the hay harvest, and one other month in the summer for the corn harvest. But notice must be given to the surveyors of the highways and turnpike road, within three days after every such meeting, and fourteen days at least before the beginning of each month (*b*).

Time when no duty to be performed.

It was contemplated by the legislature, that the statute-duty and composition might not prove sufficient; and provision has been made for such an event. And, consequently, if the surveyor apply to the justices at their general or quarter sessions, or at some special sessions for the highways, and if such justices be fully satisfied, by proof upon oath, that the duty and money collected has been applied to the purposes of the act, or be fully satisfied, that the common highways, bridges, causeways, streets or pavement belonging to the parish, &c. are so far out of order that they cannot be sufficiently repaired, cleaned, &c. by the usual means, they may order an equal assessment upon all occupiers of lands, &c. within the parish, &c.; and it may be collected and allowed in such manner as the justices at such sessions may appoint. The money raised is to be applied towards repairs, and accounted for according to the directions of the magistrates from time to time, as need shall require (*c*).

Statute duty composition insufficient.

Notice of such application, however, must be previously given at the church, &c. on some Sunday preceding such quarter or special sessions, or, if the place be extra-parochial, to some of

Notice.

(*a*) 34 G. 3. c. 74. s. 6.

* Which means:—1. Public notice of the day, hour, and place, on the Sunday preceding. 2. Notice in writing fixed on the door of the church, &c. or most public place if no church, &c. and specifying the purpose of the meeting. 3. Meeting not to be held until five days after the notice. 13 G. 3. c. 78. s. 67.

(*b*) 13 G. 3. c. 78. s. 43.

(*c*) Id. s. 45.

the principal residents, a week at least before the sessions (*a*). But such assessment must not exceed 9*d.* in the pound, of the yearly value of such lands, &c. (*b*).

Further assessment.

It having been found by experience, that these assessments were not sufficient to answer the purposes intended, an additional assessment was directed by a subsequent statute to be applied for by the surveyor at the sessions, as before mentioned. The justices to be fully satisfied of the inadequacy of the means employed for repair at the time of the application. The assessments to be levied and collected in the same manner as is directed by 13 Geo. III. (*c*). Notice of this latter application must be first proved before the justices, on the oath of the surveyor, to have been given at the church, &c., on two Sundays preceding the general or quarter sessions, or special sessions for the highways; or in townships or places where there are no churches or chapels, to have been stuck up, in writing, in two or more conspicuous places within such township, &c., one week at least before the sessions; or, such notice must be proved to have been given in extra-parochial places, in writing, to some of the principal residents there, a week at least before the sessions, so that any person liable to the assessment may have an opportunity of stating it before the justices (*d*). Such additional assessment must not exceed 1*s.* 9*d.* in the pound. (*e*). The last assessment, we have shewn, is to be levied in the same manner as the former, and the course is, that persons refusing or neglecting to pay, shall be distrained upon by the surveyor, or other person authorized under the hand and seal of one justice having jurisdiction, the overplus to be rendered back to the owner, after deducting the charges of the distress. In default of distress, the offender may be sent to gaol till he pay the assessment, and the costs incurred by the neglect or refusal (*f*).

Statute duty on turnpike roads.

Statute duty and composition are prescribed by the Turnpike as well as the Highway Acts.

First, it is declared generally, that all persons liable by law to do statute work, or to repair a turnpike road, shall remain so chargeable. Two or more justices of the county where the road is, are required, upon application by any three trustees or commissioners, or their clerk or surveyor, to adjudge and determine yearly the proportion of the statute work to be done upon the road by the inhabitants of the respective parishes through which the road may lead, and also, what proportion of the money re-

(*a*) 13 G. 3. c. 78. s. 45.
(*b*) Id. s. 46.
(*c*) 54 G. 3. c. 109. s. 1.
(*d*) Id. s. 2.
(*e*) Id. s. 3.
(*f*) 13 G. 3. c. 78. s. 68.

ceived by the surveyors of highways, as composition money, shall be paid by them to the trustees, &c. or their treasurer (*a*).

Lists of persons liable.

In furtherance of this arrangement, the surveyor of the highways for every parish, &c. shall, upon order in writing from the justices, (such order being applied for by any three or more trustees, &c., or their clerk or surveyor, and delivered to the surveyor, and left at his last or usual place of abode,) bring and deliver within ten days to the turnpike surveyor, at his place of abode, true and perfect lists in writing of the names of the several persons who may be liable to do statute work * in that year within the parish, &c. or liable to a payment by way of composition. The nature of the work, whether with teams, draughts, or otherwise, must be distinguished, together with the amount of the respective sums to be paid. Such lists are to be made conformably with the direction of any statute for the repair of highways, and may be made in the form specified in the schedule to this act †.

Notice.

The lists being received, it becomes the duty of the turnpike surveyor to advertise the surveyor of highways of the time of laying such lists before the justices, for the purpose of apportioning duty.

Adjudication of justices.

The lists shall then at the due time be so laid before the magistrates by the turnpike surveyor, in the presence of the highway surveyor, (if he attend,) and the justices shall appoint so many persons out of the lists to do statute duty as they may think reasonable, and such work shall be done at the times appointed by the trustees, &c. or their surveyor. And then also, the justices shall direct the composition money to be paid over as above mentioned, in such proportion and at such times as they shall think fit (*b*).

Penalty on defaulters.

Persons neglecting or refusing to do the work, after notice in writing left at their last or usual place of abode for that purpose by the road surveyor, shall be liable to the same penalties as are in force for the repair of the public highways, for every day of default by themselves, or by their labourers, teams, &c. (*c*) Idle or negligent labourers or carters, being found so by the surveyor of the road, may be removed or dismissed by such surveyor; and in that case, every such person ‡ shall be subject and liable to the respective forfeitures and payments aforesaid, as if he had ne-

(*a*) 4 G. 4. c. 95. s. 80.

* It has been holden, that where trustees turned a turnpike road into a parish where it did not run before, the inhabitants of such parish were not bound to do statute work. 1 Sir Wm. Black. 63, Wheeler v. Cooper.

† Vide the act.

(*b*) 4 Geo. 4. c. 95. s. 80. and see ante, p. 94.

(*c*) Ibid.

‡ Which means, by analogy to the highway act, the *master of such person*, or the *party required to do or furnish the statute work*, whether master or labourer.

glected or refused to come, or such team or draught had not been sent to work on any part of such road. Such forfeitures to be paid to the treasurer of the trustees, and applied towards the amendment of the road (*a*).

Penalty on surveyor not delivering lists.

A refusal or wilful neglect on the part of the highway surveyor to deliver the lists, or the wilfully giving in of false and imperfect lists, or the refusal or neglect to collect or pay over the composition money, are offences which incur a penalty not exceeding 10*l*. The fine is to be levied by a distress warrant under the hands and seals of two justices for the county, &c. where the road is situate (*b*). Should there be no highway surveyor, the churchwardens and overseers of the poor are to deliver the lists with the like notice as has been already mentioned, and in default of there being churchwardens, &c., any inhabitant may be required to perform this duty by an order in writing as above stated (*c*).

If no highway surveyor, other persons to deliver lists.

Composition.

The trustees, &c. may compound with any person, body politic or corporate, and also with any surveyor of highways within the line of road, for a certain sum by the year or otherwise, as the trustees, &c. shall think reasonable, in lieu of the whole or any part of the statute work, such composition money to be applied for the purposes of the road. The surveyor of highways is to be reimbursed in like manner as in the case of buying materials for the repairing of any other highway (*d*). Such composition money is to be paid at such time and manner as shall be agreed on at the entering into the composition (*e*).

Surveyor how reimbursed.

Statute duty dispensed with.

But if the condition of the road should be such, as to repair and revenue, that the statute duty may be dispensed with in the whole or in part, and employed more advantageously for the benefit of other highways within the parish, &c. the justices may, upon application of the highway surveyor, or of any two inhabitants of any parish, &c. at any special sessions, summon before them the clerk and surveyor of any turnpike road within the parish, &c. or place alleged to be in the situation described. Such persons so summoned must produce a state of the revenues and debt of the road, and the justices shall inquire into the state of repair both of the road, and of the other highways, and if the justices shall be of opinion that such duty may be dispensed with without endangering the securities for the monies advanced upon the credit of the tolls, and that such duty is wanted else-

(*a*) 4 G. 4. c. 95. s. 80.
(*b*) Ibid.
(*c*) 4 G. 4. c. 95. s. 81. As to the schedule, see 4 G. 4. c. 95. s. 77.
(*d*) 3 G. 4. c. 126. s. 105. That is, by an assessment under 13 G. 3. c. 78. ss. 30 and 46, and 54 G. 3. c. 109. s. 3. and see post, in this chapter.
(*e*) 4 G. 4. c. 95. s. 82.

where, as above mentioned, they may order the duty so dispensed with to be performed either wholly or in part upon the other highways, &c. under the direction of the surveyor of highways, and during such time as they shall think reasonable (*a*).

Materials for repair, how to be got.

The gaining materials for the reparation of ways, is the next subject which follows, and very ample powers for this purpose have been vested in the surveyors of highways and turnpike roads, by acts of the legislature. Thus, it is declared by the highway act, that the surveyor may take as much of the rubbish or refuse stones of quarries within the parish, &c., as he may judge to be necessary for the amendment of the highways without leave of the owner of such quarries, except such as may be taken by the turnpike surveyor (*b*).

Stones from quarries.

Gravel, sand, &c.

No prejudice to river, house, &c.

But the surveyor may not *dig* or get *stone* in the quarry without the owner's licence. He may search for, dig, and take gravel, sand, chalk, stone, or other materials for repair, in any waste land or common ground, river or brook within the parish, &c., or in any other parish, &c., where such materials are likely to be found, in case he have not sufficient within his own parish, and leave sufficient for the use of the other parish. But the course of the river must not be diverted or interrupted, nor must any building, highway, or ford be damaged; and such surveyor may not dig or get the same from any river or brook within the distance of one hundred feet above or below any bridge, nor within the like distance of any dam or weir. The surveyor, moreover, may gather stones lying on any lands or grounds within the parish, &c., for repair, without making any satisfaction. But satisfaction must be made for any damage done to the grounds of any person in consequence of carrying away such materials, and the stones last mentioned must not be gathered without the consent of the occupier, or a licence from a justice, after having summoned such occupier, and heard his reasons for refusing his consent, if he appear and give any (*c*). Nor may the surveyor take any stones from the beach of the sea, where it is private property (*d*). Should there not be sufficient materials in the waste lands, &c. the surveyor may go into the several and inclosed lands within the parish to get materials, or, by licence from two justices at a special sessions, within any other parish adjoining the highway, should it appear to such justices that sufficient materials are not to be had within the surveyor's parish, or in the *waste lands, &c., of the adjacent* parish, and if it should also appear that a sufficient quantity of materials will be left for the use of the other parish, &c. Always provided, that he may not go upon a garden, yard, avenue to a house, lawn, park, paddock, or enclosed plantation. He may

Damage.

Nor from the sea beach.

Surveyor may go on enclosed grounds.

Not being a garden, &c.

(*a*) 3 G. 4. c. 126. s. 109.
(*b*) 13 G. 3. c. 78. s. 27.
(*c*) Ibid.
(*d*) Id. s. 28.

Damages.

carry any such materials as he thinks fit, making such satisfaction for damage as shall be agreed on between him and the owner, occupier, or other person interested in the premises, and with the approbation of two or more substantial inhabitants of the parish, &c. The justices of the limit to settle the matter in case these last cannot agree. Should the surveyor be in want of burnt clay, he may dig clay in such places as he is authorized to dig chalk or gravel, and may *dry* the same upon the adjoining lands, and he may *burn it* upon any waste lands, &c.; and carry it like other materials upon making satisfaction for any damages within inclosed lands, where such clay may be placed or carried. If the owner, nevertheless, of any such inclosed lands should have occasion for any such materials lying there for the repair of any highway, or of other roads or ways upon his estate, or which he shall be under an obligation to repair, and shall advertise the surveyor that he apprehends that there will not be enough for his own use, the surveyor may not then take the materials without the owner's consent, or an order of two justices, the owner or his steward or agent being first summoned and heard. The justices to exercise a discretion in the whole matter (*a*).

Burnt clay.

Consent of owners, when necessary.

Surveyor buying materials, how to be reimbursed.

Supposing that the materials required cannot be found in the places above mentioned, the surveyor may be obliged to buy materials, and make recompence to the owner of the land from whence he gets them. In order to be reimbursed his outlay in this matter, he must apply to the justices at special sessions *, and make oath of the sum he has bonâ fide laid out, or which will be required. The justices then, or any two, &c., by warrant under their hands and seals, shall cause an equal assessment to be made upon all occupiers of lands, tenements, woods, tithes, and hereditaments within the parish, &c., where the money has been or is to be expended. The collection to be levied by such person, and in such manner as the justices at those sessions shall direct, and the money to be employed and accounted for according to the order of the aforesaid magistrates (*b*). The assessment to be levied, as we have already mentioned in a former page (*c*), but it may not exceed 1*s.* 9*d.* in the pound, in one year, of the yearly value of the lands, &c., assessed (*d*) †.

Contracting for carrying away materials.

The surveyor may contract for labour when the proportion of statute duty is insufficient for the getting and carrying away of

(*a*) 13 G. 3. c. 78. s. 29. See the case of Boyfield v. Porter, 13 East, 200, post, in the next chapter.

* The reimbursement must have been made at the special sessions under the old law. Rex v. Islington, Comb. 235.

(*b*) 13 G. 3. c. 78. s. 30.

(*c*) P. 104.

(*d*) 54 G. 3. c. 109. s. 3. and see s. 1. which speaks of *all* the assessments of the General Highway Act.

† It was 6*d.* in the pound by 13 G. 3. c. 78. c. 30. and by the 46th section of the same statute, 9*d.* in the pound.

the materials. He must call a meeting for the purpose, and contract in the presence of his assistant if he have one. Ten days' notice of the meeting must be given in writing by fixing it on the door of the church, &c., or most public place in the parish, &c., which notice must specify the work to be done, and the time and place for letting it. A fine of 10*l.*, and incapacity to act again as a surveyor salaried under the act, are the punishments to be inflicted on any surveyor who may have any share, directly or indirectly, in such a contract on account of the highways, bridges, &c., under his care or management, or who may, on his own account, let any team to hire, or sell or dispose of any timber, stone, or other materials to be used in such repair, unless he first obtain a licence in writing from a justice of the limit to sell such materials, or let any such team to hire (*a*).

Materials in other parishes, when to be dug.

The time for removing materials for the use of any parish, &c., other than that wherein the same are found, is restrained between the 1st of April and the 1st of November, or in the winter season, during hard frost (*b*).

Surveyor to fence off pits, holes, &c.

We have already shewn, that satisfaction is to be made in case of any damage done to private property; it is observable, further, that surveyors are to repair, as soon as possible, any mischief they may happen to occasion. Thus, if in searching for gravel, &c., or other materials, any pit or hole be made in any lands or grounds, rivers or brooks, wherein such materials shall be found, the surveyor, or other person, must cause it to be *immediately fenced off;* and the fence to be supported and repaired, while the pit or hole remains open. Should no materials be found, he shall, within *three days* after the opening of such pit or hole, cause it to be forthwith filled up, levelled, and covered with the turf or clod which was dug out. When materials shall be found, and sufficient have been procured, he must cause the place to be filled up, sloped down, or fenced off, within fourteen days, and so continued. Every surveyor, on his coming into office, shall cause all pits and holes then open, and not likely to be further useful, to be filled up or sloped down. And should they be likely to be further useful, he must secure them by posts, rails, or other fences, to prevent accidents to persons or cattle.

Penalties on surveyor for neglect.

The penalties for neglecting these directions, are, 10*s.* for every default in filling up, sloping down, or fencing off the pits or holes; a further penalty, not exceeding 10*l.*, nor less than 40*s.*, for neglecting to fence off such pits or holes, or to slope them down, for the space of six days after notice received from a justice, or from the owner or occupier of such several grounds, river, or brook, or from any person having a right of common within such

(*a*) 13 G. 3. c. 78. s. 50.
(*b*) Id. s. 32.

common or waste lands, such neglect and notice being first proved upon oath before one or more justices. The justices to determine and adjudge the forfeiture, which is to be laid out in fencing off, filling up, or sloping down the pits or holes, and towards the repair of the roads in the parish, &c., as the said justice or justices shall direct, and to be levied, like other forfeitures under the act, by distress (*a*).

Damaging mills, &c.

Moreover, if any one, contrary to the direction of the act, shall dig, or cause to be dug, materials for the highways, whereby any bridge, mill, building, dam, highway, ford, mines, or tin works may be damaged or endangered, the offender incurs a forfeiture of a sum not exceeding 5*l.* nor less than 20*s.*, at the discretion of the court or justices before whom the complaint is made (*b*).

Materials from turnpike roads.

The course to be pursued by the surveyors of the turnpike, in respect of getting materials, is very similar to the highway regulations. They may take materials from any common river or brook, (not being within fifty yards of any bridge, dam, weir or jetty,) or from any waste or common, where the road is in the parish or in any one adjoining;—they may do this without payment, or being deemed trespassers. But they must fill up the pits or quarries, level the ground, or slope the banks, and rail and fence off such pits, &c., so that the same may not be dangerous to any persons or cattle *, and if the materials be carried over any inclosed grounds, they must in that case make compensation for damages. As in the case of highways, the turnpike surveyor may enter upon inclosed grounds for the purpose of getting materials, provided he do not meddle with any garden, yard, park, paddock, planted walk or avenue to any house, or any piece of ground planted and set apart as a nursery for trees. But he must in this last case make or tender satisfaction for the *materials* †, and for the damage done, either where the materials are dug from, or where they are carried over, as the trustees, &c., may think reasonable. And further, they may land on and carry through any inclosed lands, not being garden, &c., or through any waste lands,—stone or other materials for repair, or for the building or repairing of toll-houses, from any river,

(*a*) 13 G. 3. c. 78. s. 31.

(*b*) Id. s. 33.

* With scarcely any variation, there is the same provision in a subsequent section, for filling up pits, &c. as in the highway act, only that the penalty in the first instance by the turnpike is 20*s.* instead of 10*s.* for every default. 3 G. 4. c. 126. s. 99.

† A recent act supposes the case of such materials being of *no value*, and declares that the trustees shall not be required to pay more for materials than such sum as it shall appear to the two justices that such materials could be sold for in case the trustees had not taken them. The justices to assess the *damages* done in the lands only, in case they may be of opinion that such materials could not be sold or disposed of before the taking of them. 7 & 8 G. 4. c. 24. s. 15.

stream, or canal in any parish, &c., where the road is, or adjoining parish, &c., paying or tendering for the damage according to the discretion of the trustees, &c. Should there be any difference between the trustees, surveyors, &c., and these owners or occupiers, any two or more justices for the county, &c., wherein the place whence the materials have been taken is situate, shall settle the matter, and adjudge the costs attending the hearing, upon ten days' notice in writing given by either party to the other (*a*).

Before these materials are taken from private lands, notice must be given in writing, signed by the surveyor, to the respective owners or occupiers, or left at their houses, or last or usual places of abode, in order that such persons may appear before any two or more justices for the county, &c., from whence the materials are intended to be taken, to shew cause why such materials should not be so had. If the party should attend, and should not shew sufficient cause, the surveyor or other person will be authorized by the justices to take the materials at such time as the magistrates shall see proper; and should the owner, &c., not appear, by himself or his agent, the justices may, upon proof on oath of the service of notice, make such order as they may think right notwithstanding (*b*).

It is observable, that fuller powers are awarded by the turnpike act for entering upon inclosed lands, inasmuch as the surveyor is not bound to make it appear before the justices, that he cannot get sufficient materials from the waste lands, &c., as prescribed by the highway act*.

Purchase of lands.

Moreover, the trustees, &c., are empowered to contract and agree for the purchase or demise of lands for the purpose of digging stone, &c., for repair, and subsequently to sell the land so bought, by public auction or tender, so that such contract or agreement be not compulsory on any person who may be unwilling to enter into it (*c*). A penalty of 5*l.* is inflicted upon any person who shall take away any materials got for repair of the road, or any materials dug, &c., from any quarry opened for the purpose of getting such materials, before the surveyor of the road, and the workmen employed shall discontinue working therein for six weeks, always excepting the owner or occupier of private grounds, and persons authorized by such owner or occupier to get materials in such quarry for his own private uses, and not for sale (*d*).

Penalty for taking materials.

(*a*) 3 G. 4 c. 126. s. 97.
(*b*) Id. s. 98.
* For want of shewing this, orders of sessions were quashed as late as the year 1757. 1 Burr. 377, Rex v. Manning.
(*c*) 3 G. 4. c. 126. s. 100.
(*d*) Id. s. 101.

Lands for repositories.

Lands may be purchased or rented as repositories for materials.

Any piece of land not exceeding in any one place six yards square, on the sides of the road, may be thus purchased or rented as a repository for stone, gravel, &c. Two justices for the county, &c., where the land is, to settle any dispute between the owners, and the trustees, &c., and also to decide on the necessity or propriety of taking the land. Such settlement to be made upon notice, &c., and in like manner as is directed with respect to the getting of materials for the repair of the road (*a*). Further, the trustees, &c., may purchase or rent for the same purpose any piece of land within ten miles of the Royal Exchange, with the consent of the owner or proprietor, so as that the same do not exceed in the whole half an acre (*b*).

Surveyor not to be concerned in contracts.

Surveyors are absolutely prohibited from any contracts for materials, tools, &c. on their own account, or from letting any teams, &c. as in the highway act, only the penalty is 50*l.* instead of 10*l.*, and no licence from the justices is permitted by the turnpike regulations. But the further punishment prescribed by the highway act of future incapacity to act as a surveyor is not added (*c*).

Compensation money, how levied.

Sums payable under any turnpike act by the order of justices as a compensation or satisfaction for any materials or costs, or for any damage, spoil, or injury of any kind whatsoever done by such trustees, &c. shall, if not paid within ten days after a demand in writing from the clerk to the trustees, &c., or their treasurer, in pursuance of the order of justices, and in which demand the order of justices, or of the justice, shall be stated, be levied and recovered by distress and sale of the trustees' goods, or those of their treasurer under a warrant from such justices. The justices are required to grant this warrant under their hands and seals, upon application of the parties entitled to receive the money. Should any overplus remain after payment of the compensation, and of the costs of the hearing, and of the distress and sale, it must be returned on demand to the trustees, &c. or their treasurer. The treasurer is empowered to retain his own damages and expences in consequence of the warrant, out of any monies which come into his hands by virtue of any turnpike act (*d*).

Canal companies may

Finally, the proprietors, or the trustees of the proprietors of any canal, rail-way, or tram-road, on which any materials, for the

(*a*) 3 G. 4. c. 126. s. 102, and see ante, p. 111, s. 97, of the statute.
(*b*) 4 G. 4. c. 95. s. 56.
(*c*) Id. s. 45, and see ante, p. 109. 13 G. 3. c. 78. s. 50, and as to trustees, who are forbidden to do the like, post, Ch. VII.
(*d*) 4 G. 4. c. 95. s. 71.

repair of turnpike roads, may be conveyed, are authorized to reduce the tolls imposed by any act of parliament on the carriage of such materials so carried, and to appoint lower tolls, as they shall think proper. All such reduced tolls shall be collected and recovered by the same persons and means, and by the same powers, provisions, and forfeitures, as the original tolls might have been taken, in case there should not have been any reduction (*a*).

lower their rates for carriage of materials.

It was very early held, that clergymen were not privileged from contributing to the repairs of the highways (*b*). An inclosure act directed, that all great tithes should be extinguished, that the commissioners should ascertain the net value of the tithes, and fix a fair clear annual rent per acre in lieu of them. It was held, that the rector was liable to the repair of the highways (*c*). But *express words of exemption* from rates and taxes will relieve him from such a burthen; and so it has been ruled more than once in the case of an assessment to the poor-rate.

Persons claiming to be privileged from duty.

It was held also, that the king's moneyers were not exempt from this charge (*d*); although they pleaded their exemption under the king's letters patent, by which the lands which were chargeable to send men were exempted, for this grant took place before the making of the statutes which required duty (*e*). A particular township, however, or particular persons, may be exempted by act of parliament (*f*). And no serjeant, corporal, or drummer of the militia, nor any private man, from the time of his inrolment until his discharge, shall be compelled to perform any highway duty, commonly called, *statute work* (*g*).

It may not be amiss to insert shortly in this place some of the decided cases of exemptions from paving rates. Houses built on land embanked from the Thames, pursuant to 7 G. 3, were held exempt from rates under 11 G. 3, for clearing the vaults and sewers of London (*h*). So also were the respective apartments of the Masters in Chancery in Southampton Buildings (*i*).

Exemptions from paving rates.

Under the Foundling Hospital paving act (*k*) the landlord of

(*a*) 3 G. 4. c. 126. s. 103.
(*b*) 1 Ventr. 273, Webb v. Batchelour. 2 Lev. 139, S. C. 3 Keb. 476, S. C.
(*c*) 5 B. & C. 702, Rex v. Lacy, and see 1 B. & C. 485, Rex v. Dayrell, and other Justices of Bucks.
(*d*) Comb. 10, Brent v. Whitchcock.
(*e*) 3 Mod. 96, Brett v. Whitchot, S. C. as note (*d*).
(*f*) 2 Term Rep. 106.
(*g*) 42 G. 3. c. 90. s. 174.
(*h*) 4 Term Rep. 4, Eddington v. Borman. And see 8 B. & C. 54, Rex v. London Gas Light Company, where it was held, that such land was also exempt from poor rates.
(*i*) 3 B. & P. 129, Holford v. Copeland.
(*k*) 34 G. 3. c. 96.

a newly built house was held not liable to be rated before the occupation of the house (*a*). Under a local act for lighting, watching, &c. the streets of a township, the rates were imposed on the tenants and occupiers of messuages, houses, warehouses, shops, cellars, vaults, stables, coachhouses, brewhouses and other buildings, gardens, or garden ground, and other tenements in the township. It was held, that the trunks, pipes, &c. of a water company did not constitute a tenement within the act, and so were not rateable (*b*). And, again, upon another occasion, it was determined, that the owner of markets which were kept in the streets and were regulated by the same act, and in which articles were exposed for sale by persons who paid a consideration for so doing, but had no stalls fixed in the ground, was not the occupier of a tenement within the act (*c*).

At a meeting of commissioners under a local act, it was determined to raise a sum not exceeding 1300*l.* for the poor, and not exceeding 500*l.* for paving the streets. The act did not require that separate rates should be raised for the poor and for the highways. Further, they directed, that the sum of 1300*l.* should be raised by a rate of elevenpence in the pound, and the sum of 500*l.* by a rate of threepence. If the rates had been collected on the whole rental of the parish, they would have produced less than 1800*l.*, but the poor rate would have raised more than 1300*l.* It was held, that both these resolutions were good, the first, as having fixed the smaller sum necessary to be raised; the second, as the act did not require the poor and highway rates to be severed (*d*).

The owner of stables in the parish of Marylebone, rented by the colonel of a troop of horse for the use of the troop, and by the king's authority, was held liable under the Marylebone parish act (*e*).

Householders are not exempted from the scavengers' rate (*f*).

Repair of private ways.

Private ways are to be repaired by the village or hamlet, or sometimes by a particular person (*g*). But strictly speaking, ways which lead over another man's grounds are private ways, and these, according to the general principle of law, are repairable by the person or persons who enjoy the privilege of using them, the burthen being imposed upon those who participate in the benefit. So that, where a person granted a right of way over his land to

(*a*) 4 Taunt. 635, Mayor v. Knowler.
(*b*) 1 B. & C. 630, Rex v. Manchester Water-works Company.
(*c*) 2 B. & C. 226, Rex v. Morley, bart.
(*d*) 7 B. & C. 314, Cortis v. Kent Water-works Company.
(*e*) 4 Term Rep. 6, Eckersall v. Briggs.
(*f*) 1 Salk. 356, Rex v. Newington Inhabitants.
(*g*) 1 Ventr. 189, per Holt, C. J. 3 Salk. 182.

another, the grantee at common law was bound to repair (*a*). But the grantor may be, and, indeed, frequently is chargeable with this duty, either by express agreement or prescription (*b*). He may bind himself, or there may be evidence that he, and all those whose estate he has in the land where the way is situate, have been accustomed to keep it in a state of repair (*c*).

The parish have no concern with private roads, and it has, therefore, been holden, that commissioners under an enclosure act, possess no power of directing inhabitants at large to maintain private ways set out by them. Where, therefore, a road was awarded to be a private way for the use of several owners of land in *C.*, and it was ordered by commissioners, that all roads, whether public or private, should be repaired like public highways, the court were quite clear that an indictment could not be supported against the parish, for they derived no benefit from the inclosure, and had no allotment under it. The words in the act, that "the private roads should be repaired by such person, &c., and in such manner as the commissioners should direct," were held to mean, such persons as were interested in the enclosure. Judgment was given for the defendants, the inhabitants (*d*). So, where commissioners under an enclosure act set out a private road and drove-way for the benefit of nine parishes, and directed that six of these parishes should maintain it, (the local act declaring, that all private roads to be set out should be repaired at the expence of all or any of the persons interested in the same to be enclosed, and as the commissioners should direct,) the court asked the prosecutor's counsel, when the case was called on for argument, how it could be contended, that the non-repair of such a road was an indictable offence, it being only a private road. The counsel answered, that this non-repair was a disobedience of a public statute, and therefore the subject of an indictment; and, that as it appeared by the special verdict that no less than 250 persons were liable to the repair of the road, the difficulty of suing so many was almost insuperable. But the court gave judgment for the defendants; they said, that many public acts passed which regulated private rights, without there being any remedy by indictment for the infringement of such, that even if it were true that no remedy by action existed, the consequence would not follow that an indictment could be supported, but that in truth the parties injured had another legal remedy (*e*).

(*a*) 3 Cru. Dig. 115.
(*b*) Ibid.
(*c*) See Dougl. 748, 9. 1 Saund. 322, (*a*). See post, Ch. IX. on Pleading.
(*d*) 6 Term Rep. 20, Rex v. Cottingham Inhabitants.
(*e*) 8 Term Rep. 634, Rex v. Richards and others.

CHAPTER VII.

Of the Improvement and Management of Highways and Turnpike Roads.

Section I.—Of the Improvement of Ways.
Section II.—Of the Management of them.

Section I.—Of the Improvement of Ways.

The improvement of ways, as far as relates to the repair of them, has just been discussed at large. Various other useful amendments and alterations are, however, accomplished from time to time by the respective persons who have power for that purpose, and of these we propose to treat in the present section.

1. Widening, diverting, turning, highways.

First, as to the widening, diverting, and turning of highways. It is a general rule, that surveyors must make every public cart-way leading to any market town, twenty feet wide at the least, and every public horse-way or drift-way, eight feet wide at the least, if the ground between the fences inclosing the same will admit of such enlargement (*a*). More enlarged powers for this purpose are given by the next section of the act. For any two or more justices of the county, &c. may order highways to be widened and enlarged within their respective jurisdictions, if it shall appear to them upon view that such roads are not of sufficient breadth, and may be conveniently widened, or diverted and turned, if they cannot be widened, and made commodious for travellers without diverting and turning them. Such ways, however, must not exceed thirty feet in breadth after the enlargement, and no house or building shall be pulled down, nor the ground of any garden, park, paddock, court, or yard taken away.

Not to be more than thirty feet wide.

No house, &c. to be touched.

Satisfaction to owners.

Satisfaction must, nevertheless, be made to the owners or occupiers of land for ground which is taken for such purposes of improvement, whether they be private persons, or bodies politic or corporate, and whether seised or possessed of, or interested in their own right in such ground, or in trust for others. The surveyor is to make an agreement for the purchase of the ground under the direction of the magistrates, and for the making of new ditches and fences. The next provision is, in case these persons or corporations should not be found, or should refuse to treat, or to take the recompence offered them by the surveyor. The justices at any general quarter-sessions for the limit where the ground is, may

What done in case of their refusal.

(*a*) 13 G. 3. c. 78. s. 15.

then impannel a jury of twelve disinterested men out of the persons returned to serve as jurymen at the sessions. But prior to this, there must be a certificate in writing signed by the justices who made the view, and fourteen days' notice must, besides, be given by the surveyor to such owner, &c. or to the guardian, trustee, clerk, or agent of such owner, &c. signifying the intention of applying to the sessions. That being done, the jury impannelled shall, upon their oaths, assess the damages, but not at more than forty years' purchase of the clear yearly value of the ground, together with a recompence for the making of new ditches and fences on the sides of the road, and also satisfaction to any person, &c. otherwise injured by the proposed alteration.

Land taken to be a public highway.

Then, upon payment or tender of the money so assessed, or leaving it in the hands of the clerk of the peace, for the use of the owners, &c. in case the parties cannot be found, or shall refuse to accept it, the interest in the soil shall be divested out of them, and the ground shall be taken to be a highway. Mines, minerals, and fossils lying underneath which may be got without breaking the surface of the way, are saved to the owner (*a*). There might not be money sufficient for the above purposes in the hands of the surveyor, and, in such case, the two justices who made the view, in case of agreement, or the sessions, if after verdict, shall order an equal assessment upon all the occupiers of lands, &c.* in the respective parishes, &c. where the highways may be, and direct the money to be paid as they shall respectively appoint. The money so raised shall be employed and accounted for to such justices or to the sessions, for purchasing the land required, and making the ditches, &c. together with satisfaction as above stated. Such assessment, if not paid within ten days after demand shall be levied by the surveyor under the order of such justices or of the sessions†, but it may not exceed 6*d.* in the pound (*b*).

Costs of these proceedings.

The costs of these proceedings are regulated by the act; for if the jury give their verdict for more money than has been offered by the surveyor before the application to the sessions, such surveyor must bear the costs, and pay them, either out of the monies in his hands, or the assessments to be levied, but if the jury shall give a verdict for no more, or for less, then the persons, &c. who have refused to accept the recompence must defray the expences (*c*).

(*a*) See the provision as to timber, ante, p. 37.

* Lands, tenements, woods, tithes, and hereditaments.

† According to s. 68 of the act.

(*b*) 13 G. 3. c. 78. s. 16.

(*c*) Id. s. 18. Where trustees were authorized to improve public streets, and sell waste lands to defray the expences of so doing, and to use the money as they should think fit for the purposes of the act, it was held that the defendant, a

Footway diverted.

The mode of adjudging damages where a footway is diverted is as follows. If it be diverted through the land belonging to the same person who owned the land through which the old footway lay, it shall be deemed an exchange, and no satisfaction made, unless the land used for the new footway be of greater length and value than that used for the old. If the footway should not be turned through the lands belonging to the same person, then the damage occasioned by the old footway to the lands through which it lay shall be adjudged by two indifferent persons, (should the parties interested not agree in adjusting the same,) the one to be named by the owner of the land, [that is, the land to be used for the new way,] the other by the two justices. Should the nominees not agree, some third person to be chosen by them shall adjudge it, and his determination shall be final. The money at which the damages are assessed, is to be applied in making satisfaction to the owner of the land through which the new footway is to be made (*a*).

It was once contended, that this power of widening highways did not extend to roads repairable by private persons *ratione tenuræ*. Certain surveyors, alleging that a road, which two justices had upon view ordered to be widened, was not repairable by the parish, but by private persons, refused to obey such order, and were consequently indicted. But the court considered, that there could not exist a doubt, but that the person before liable *ratione tenuræ*, would be still liable in the proportion he formerly was. And judgment was given for the crown upon demurrer to the plea of the defendants (*b*).

Turning highways with consent of owner.

The next circumstance attending the turning of highways which we shall notice is, where the alteration by diverting is made *with the consent of the owner;* and, in that case, the order may be made at the *special sessions*. Whether it be a public highway, bridleway, or footway, any two or more justices, if upon view it shall appear to them, that it may be diverted so as to become nearer, or more commodious, may divert, turn, and stop it up by order at some special sessions. They may sell the old way, and purchase ground for the new, subject, however, to the exceptions and conditions in all respects which are above mentioned in the case of turning highways (*c*); and subject also *to the consent, under hand and seal, of the owner of the land through which it is proposed to make the new line of road* (*d*). The notices required upon this occasion have been mentioned in

trustee, was not authorized to expend the money in the opposition of a bill in parliament which, if successful, would defeat the act under which he received the money. 2 Chit. 610, Edwards v. Wilson.

(*a*) 13 G. 3. c. 78. s. 21.

(*b*) Cowp. 648, Rex v. Balme and others.

(*c*) Ante, p. 115.

(*d*) 55 G. 3. c. 68. s. 2.

the chapter on Extinguishment (*a*), together with the appeal, and other proceedings, by reason of an order of this nature (*b*). These last-mentioned provisions superseded the nineteenth section of the 13 G. III. c. 78, the greater part of which was repealed by them, and they were introduced for the purposes of giving more public notice of orders concerning the diverting and stopping of highways, &c. for the facilitating of appeals, and for the more easy abolition of unnecessary ways.

Part of the nineteenth section enacted, that highways which had been turned for more than twelve months, and acquiesced in, and concerning which no suit or prosecution had been commenced should be thenceforth public highways, if another highway were made in lieu thereof.

This clause was held to be *retrospective* only, and is, now, therefore, no longer called into operation; and, consequently, the whole section may be laid out of our consideration, except as it regards such roads as were made before the passing of the 13 Geo. III., upon which questions are not likely again to arise. The court, moreover, held in the case alluded to, that the statute 34 Geo. III. c. 74. s. 7. did not extend the clause in question (*c*).

We have seen (*d*), that *notices* of special sessions must be served on the justices of the division in the case of extinguishing ways. It is only necessary to remark here, that the same rule prevails in the case of *diverting and turning* them.

Consent of agent insufficient.

It must appear on the face of the order, that a sufficient assent has been given by the owner of the land. So that where it appeared upon an enrolment of an order for diverting, that E. W. for herself, and *T. B.* solicitor for W. S. [the owner] gave their assent, under hand and seal, it was holden, that no valid agreement had been executed by the owner(*e*). Further, the consent must be given by the owner of the estate at the time of making the order, so that where it stated an assent by T. J. in his life-time, and that the justices had received evidence of such assent, the order was holden bad, because it did not appear that T. J. was alive (*f*). There must not be any material variance between the order and the form prescribed by the act of Parliament. Where, therefore, the act directed, that the length and breadth of the new way should be set out, but that description was omitted in the

(*a*) Ante, p. 62.
(*b*) Ante, p. 62, &c.
(*c*) 8 Term Rep. 133, Waite v. Smith. And see Delane's Highway Laws, p. 9, note.
(*d*) Ante, p. 64.
(*e*) 1 B. & C. 622, Rex v. Kent Justices. 3 D. & R. 6, Rex v. Crewe. Semb. S. C.
(*f*) 1 B. & C. 21, Rex v. Kirk.

order, the court quashed it, and held, that the parties were not concluded by the appeal, but might take advantage of the objection as a defence to an action of trespass (*a*). So, again, the order should state in what parish the way is situate (*b*).

Widening, diverting, &c. of turnpike roads.

The trustees, &c. may make, divert, shorten, vary, alter, and improve the course or path of any road under their management, tendering and making satisfaction where they come upon private grounds, but without satisfaction where they go through waste lands, &c., so as that such road shall not exceed sixty feet in width; and also foot-paths, causeways, bridges, arches, banks, culverts, ditches, drains, and fences on the line of the road. In order to do this, the trustees, &c. their surveyor and workmen may enter upon the lands aforesaid, where the improvement on such road, path, &c. is to be made, with or without carts or carriages, and also upon any adjoining grounds, to stake out the same according to their discretion, without being deemed trespassers, or being subject to any fine, &c. for so doing. Any person pulling up, removing, or destroying any stakes or other marks used for the purposes aforesaid, is to forfeit a sum not exceeding 5*l.* for every offence (*c*).

Road ruinous.

If the turnpike road be ruinous, the trustees, &c. may cause a road to be made through the adjoining grounds (provided they do not meddle with houses, yards, gardens, parks, paddocks, planted walks or avenues to any house, or any inclosed ground planted and set apart as nurseries for trees) to be used generally as a public highway while the old road is repairing or widening, and till it be convenient for passengers and carriages to pass along it. They are to make a reasonable recompence to the owner or occupier according to their discretion, and should any difference arise, any two justices for the county wherein the grounds are may determine the matter, fourteen days' notice in writing being previously given by one party to the other (*d*). As soon as the road is diverted or turned, and the new road made, it shall be in lieu of the old road, and subject to all the provisions of the legislature concerning the old road: it shall in effect be deemed a highway, and shall be repaired as such (*e*).

Buying

For these improvements, trustees are invested with the power

(*a*) 1 East, 64, Davison v. Gill. See 6 B. & C. 640, Rex v. Kenyon. See 3 D. & R. 36, Rex v. Casson, where there is a quære whether the order need state the names of the owners. It certainly is more safe and proper that it should.

(*b*) See 6 B. & C. 640, Rex v. Kenyon.

(*c*) 9 G. 4. c. 77. s. 9, under the words in a local act, "improve or alter the course or path of the road," it was held, that trustees might lower hills, and raise hollows. 2 B. & C. 703, Boulton v. Crowther.

(*d*) 3 G. 4. c. 126. s. 111.

(*e*) Id. s. 88.

of purchasing lands. And for the like purpose, all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all persons whomsoever are empowered to contract, not only on behalf of themselves, their heirs or successors, but also on the behalf of reversioners, remainder-men, or persons in expectancy, *cestui que* trusts, whether femes covert, infants, or issue unborn, lunaties, idiots, or other persons. Femes covert, seised or interested in their own right, and all others are declared competent to contract for the sale, or for satisfaction, or for damages sustained in consequence of the alterations. These parties may sell and convey by conveyance, lease and release, or bargain and sale, all or any such lands, tenements, hereditaments, and premises for such purposes, and such contracts shall be good without fine or recovery, and a complete bar to all estates tail, and other estates, rights, titles, trusts, and interests whatsoever, and such persons are declared to be indemnified for whatever they may do in pursuance of the act (*a*). Should the parties interested neglect or refuse to treat concerning such sale, or satisfaction, notice in writing* must be left at their houses, or with the principal officer of corporations, &c., or at the house of the tenant in possession of the lands in question. If no attention be paid to this notice for thirty days, or if the parties neglect or refuse to treat, or do not agree, or by reason of absence be prevented from treating, then the trustees, &c. shall cause the matter to be enquired into by a jury of twelve indifferent men of the county, &c. where the premises lie. The trustees, &c. are required to summon and call before such jury, and examine on oath all persons whom it may be thought proper to examine (the trustees to administer the oath) and by ordering a view or otherwise, the trustees may use all lawful means for the information of themselves and the jury. The sum being assessed, the trustees, &c. shall order payment to the owner, &c., according to the inquisition. The verdict, or inquisition and judgment, order and determination, is to be final and conclusive on all persons whomsoever, whether absent or present, whether under disabilities or not. The trustees, &c. are to issue their warrant in writing to the sheriff of the county in order to the summoning and returning of the jury, commanding him to summon, impannel, and return twenty-four indifferent persons qualified to serve upon juries, and to appear before such trustees, &c., at the time and place mentioned in the warrant. Such sheriff, by himself or deputy, is to act accordingly; and then the trustees, &c., are to cause twelve persons to be sworn out of the pannel, or such as shall appear upon the summons; and these shall be a jury for

lands for improvement of roads.

What to be done if parties disagree.

(*a*) 3 G. 4. c. 126. s. 84.

* This notice is the foundation of the whole proceedings, and, if no notice be given, the trustees have no jurisdiction. See 7 Term Rep. 363, Rex v. Bagshaw. 4 Burr. 2244.

the purposes aforesaid. In default of a sufficient number of jurymen, the sheriff or his deputy may return twelve other indifferent persons of the standers-by, or of such as can be speedily procured to attend the service. All persons to have their lawful challenges, but not to the array. The trustees, &c. are moreover empowered to fine the sheriff, deputy, or bailiff, or agent, if he make default; and also, such as being summoned and returned on the jury do not appear without sufficient excuse, or, who appearing, refuse to be sworn, or, who, being sworn, refuse to give or shall not give a verdict, or in any other manner wilfully neglect their duty contrary to the true intent and meaning of the act. A fine may be also imposed as aforesaid upon any person required to give evidence, who may neglect or refuse to appear without sufficient excuse, or appearing, may refuse to be sworn and examined or to give evidence. Provided, that no fine on any sheriff, deputy, bailiff, or agent, be more thon 10*l.*, nor more than 5*l.* on any other person (*a*).

Expences of jury and witnesses.

The provision regarding the costs is very similar to that in the highway act. If the jury find a larger sum as a recompence than the trustees have offered before the summoning of the jury, they must bear the expences generally, which the treasurer is to pay out of monies in his hands, or which he may receive by virtue of the act. Such costs are to be settled by some disinterested magistrate of the county, &c. wherever the dispute may have arisen, who is authorized to make an order on the treasurer for payment. If the jury find no more, or less money as a recompence, &c. then the expences must lie on those with whom the controversy has been carried on. Such last-mentioned costs are also to be ascertained by a disinterested justice, and deducted from the money assessed as money advanced to the use of the person entitled to receive the compensation. The payment or tender of the residue is to be deemed a payment or tender of the whole sum, or otherwise, such costs, should they exceed the damages, may, if not paid upon demand, be recovered by distress, or the party may be imprisoned if there be no sufficient distress (*b*). Always provided, that if by *absence*, any person should have been prevented from treating, the trustees, &c. must bear the costs in manner aforesaid (*c*). However, although the trustees may not meddle with buildings, &c.* (and they are restrained from doing so upon the diverting or turning of any turnpike road,) and may not deviate over any inclosed grounds more than 100 yards from the line or course of the road without the consent in writing of the owner or proprietor, or persons authorized to act on his behalf, yet with such consent they may make use of all those de-

Proviso for absence.

(*a*) 3 G. 4. c. 126. s. 85.
(*b*) See the clause for recovery of penalties, s. 141 of the same act.
(*c*) 3 G. 4. c. 126. s. 87.
* The same property is exempted as in 3 G. 4. c. 126. s. 111.

scriptions of property. Therefore all bodies politic, &c. * on behalf of themselves and others, whether in reversion, &c. †; and all femes covert seised in their own right, &c. may give consent in writing to the trustees, for the pulling down of buildings, making deviations, or making use of gardens, &c., they may contract and convey, and their contracts and conveyances shall be good, &c. in like manner as we have already stated in a former page (*a*). Provided, that nothing contained in the enactment now before us shall be construed to alter any former turnpike acts (*b*).

Trustees to fence roads.

Upon the altering of an old, or the making of a new road through private grounds, or across any public or private footway, or upon the taking away of any fence for widening and improving the road, such trustees, &c. shall have proper quickset hedges planted, or have proper fences or walls made on both sides of the newly made road, or on the side whence the fence has been removed, with sufficient ditches, and sufficient posts and rails or other fence on both sides of such quickset hedge to protect its growth, so as effectually to guard and fence off the adjoining lands from trespass or injury by horses, asses, cattle, sheep, or swine. They must also make proper gates, stiles, posts, bridges, and arches where necessary, out of such road into the lands adjoining, and must keep the fences so to be made in good order and repair for five years from the time of making or setting up the fences, unless there be an agreement on the part of the owners or proprietors of such lands to keep the fences in repair from an earlier period for that time (*c*).

What is to be done with the money assessed as a recompence for lands purchased, damages, &c.

The monies agreed for or assessed as we have above mentioned, are to be paid from funds in the hands of the trustees, &c. or out of the tolls granted for making and repairing the road, or from the monies borrowed on the credit thereof, to the persons entitled ‡, or their agents, or into the Bank of England, under the circumstances we shall presently relate. Then, upon such payment, and after thirty days' notice thereof given to the parties,

* As in 3 G. 4. c. 126. s. 84.

† As before.

(*a*) P. 120.

(*b*) 4 G. 4. c. 95. s. 65. As to signifying assent to turnpike bills by affidavit, see post, p. 127.

(*c*) 4 G. 4. c. 95. s. 66.

‡ By a recent act, this money is to be paid to mortgagees, where the lands taken are mortgaged. It is to be paid to the mortgagee, his executors, administrators, or assigns, upon application made in writing to the trustees or their clerk, and signed by the mortgagee, his executors, &c. Such sum is to be in discharge of the principal money, or part of it, and an acknowledgment of the receipt is to be made by indorsement on the mortgage deed, signed in the presence of one or more witnesses by the mortgagee, &c. Such indorsement is to be a sufficient discharge to the trustees and mortgagor for so much as is expressed thereon. 7 & 8 G. 4. c. 24. s. 7.

or their agents, or left at their usual places of abode, with the tenant in possession of the lands, &c. in question, such lands, &c. shall be vested in the trustees, &c., and may be taken and used for the purposes of the act; and the sale of such lands, &c. shall be laid into and made part of the road as the trustees, &c. shall direct, and shall be repaired by them in the same manner as any other part of the road under their management; and all parties shall be divested of all right and title to such lands, &c. (*a*).

Compensation money above 200*l.* due to particular bodies, individuals, &c.

Should the compensation money be due to any body politic, corporate, or collegiate, corporation aggregate or sole, infant, lunatic, tenant for life, or in tail, general or special, feoffee in trust, guardian, committee, trustee, feme covert, or other incapacitated person, and should the same exceed 200*l.* it must be paid into the Bank of England with all convenient speed, in the name and with the privity of the accountant-general of the Court of Exchequer, and placed to his account, *exparte* the trustees for executing the act *, pursuant to the method prescribed by 1 G. IV., intituled, "An act for the better securing the monies and effects paid into the court of Exchequer at Westminster, on account of the suitors, &c."; and to the general orders of that court, and without fee or reward. Such money may be applied under the direction of that court (to be signified by an order, made upon a petition to be preferred in a summary way by the person who would have been entitled to the rents or profits of the said lands, &c.) in the purchase of the land tax, or towards the discharge of any such debt, incumbrances, &c. as the court shall authorize to be paid, affecting such lands, or affecting other lands, &c., standing settled therewith to the same or the like uses, intents, or purposes. Or, where the money shall not be so applied, then the same shall be laid out with the like approbation of the court in the purchase of other lands, &c. which shall be conveyed, and settled to, for, and upon such and the like uses, &c., and in the same manner as the

(*a*) 3 G. 4. c. 126. s. 86, and see ante, p. 65. In the case of a person entitled to the money not being forthcoming, there appears to be a distinction between the highway and turnpike laws in this, namely, that by the enactments of the former, as soon as the money is paid to the clerk of the peace, the land becomes divested out of the party, *though he be not found:* whereas, under the turnpike laws, a notice of thirty days must be given generally to the parties, or their agents, or left at their places of abode, or with the tenant in possession, before the land can be so appropriated. To be sure, a case could hardly arise in which the usual residence of a party not to be found would not be known, or where there would be no tenant in possession, but the provisions of the highway act seem to be the most conclusive.

* That is, the act of 3 G. 4. c. 126, which is partially repealed by the statute under consideration. This latter act defines the acceptation in which divers words are to be taken through the turnpike acts. The word "trustees," is to extend to all the trustees under any turnpike act, that is, all the acts to which the general acts extend. "Person," one or more persons of either sex. "County," to include riding or division. "Parish," to include ward, district, hamlet, township, or place. 8 G. 4. c. 24. s. 19.

lands, &c. so taken stood settled or limited, or such of those uses as at the time of making such conveyance or settlement shall be existing, undetermined, and capable of taking effect. In the mean time, and until such purchase shall be made, the money shall, on application to the court, be invested by order of the court, in the three per cent. consols, or reduced, in the name of the said accountant-general. And until such stock shall be ordered by the court to be sold for the purposes aforesaid, the dividends and annual produce of the stock shall be paid from time to time by order of the court, to such as would have been entitled to the rents and profits of the lands, &c. so hereby directed to be purchased, in case such settlement or purchase were made (*a*).

Sum under 200*l.* but above 20*l.*

Should the sum under the aforesaid circumstances, and belonging to persons under such disabilities, be less than 200*l.*, and above 20*l.*, then the same shall, at the option of the person for the time being entitled to the rents and profits of the lands, &c., or of his guardians or committee, to be signified in writing under their respective hands, be paid into the Bank of England, in the accountant-general's name as above, in order to be applied to the like purposes; or otherwise it shall be paid, at the like option, to two trustees nominated by the party who has made the option, and approved of by the trustees of the road, who have taken the lands, &c., (such nomination and approbation to be signified in writing,) so that the principal money, together with the dividends and interest arising thereon, may be applied as hereinbefore directed, so far as the case may be applicable, without the approbation of the Court of Exchequer (*b*).

Sum under 20*l.*

Should, however, the sum be under 20*l.*, the same may be applied to the use of the corporation or person entitled to the rents and profits of the lands, as the trustees taking such lands may think fit, or in case of infancy, idiotey, or lunacy, then of the guardian or committee, to and for the use and benefit of the persons respectively entitled (*c*).

The next clause relates to cases where the title to the land is not clear, or where the payment cannot be satisfactorily arranged. For if any corporation or person should refuse to accept the compensation offered, or should not be able to make a good title to the premises to the satisfaction of the trustees, or if the party entitled cannot be found, or be known or discovered, the trustees may order the money to be paid into the Bank of England in the name and with the privity of the accountant-general of the Court of Exchequer, to be placed to his account to the credit of the parties interested in the said lands, &c., subject to the order

(*a*) 8 G. 4. c. 24. s. 9.
(*b*) Id. s. 10.
(*c*) Id. s. 11.

of that court. Upon the application of any claimant by motion or petition, the court is empowered, in a summary way of proceeding or otherwise, as the court shall see fit, to order such money to be invested in the funds, and to order distribution or payment of the dividends according to the estates, titles, or interests of the claimants, and to make such other order as they may think reasonable. The cashier of the Bank who receives the money is to give a receipt for it, specifying for what and for whose use the same was received (*a*).

Person in possession entitled primâ facie.

Should any question, nevertheless, arise concerning the title to the lands, or the stock purchased with the compensation money, or to the dividends and interest of such stock, the person in possession of the lands at the time of the purchase, and such as claim under him shall be deemed lawfully entitled until the contrary be shewn to the Court of Exchequer; and the stock and dividends shall be applied and disposed of accordingly, unless it be made appear to the court, that the possession has been wrongful, and that some other person may have been lawfully entitled to the same (*b*).

Trustees to pay conveyance in certain cases.

It is further declared, that where the money paid into court in consequence of the disability of the corporation or person entitled, is applied to the purchase of other lands, to be settled to the like uses, the court may order the expences of such purchases, or so much thereof as they shall think reasonable, together with the necessary costs of obtaining the order, to be paid by the trustees taking the lands, &c., who shall from time to time pay such sums for such purposes as the court may direct (*c*).

Land not wanted to be sold.

The next provision which claims our attention is, in cases where the trustees, &c., have purchased, or have become possessed of ground which they find they do not want for the purposes of the road; on which occasions they are authorized to sell and dispose of it. The first offer is to be made to the persons from whom they have purchased the land in question, or to such as have lands adjoining, and then, should those persons refuse, or not agree, (except as far as regards *the price*,) upon an affidavit sworn before a master extraordinary in Chancery, or a justice for the county, &c., where the ground is situate, (such persons being authorized by this act to take the affidavit,) by some person no way interested in the ground, and stating the offer and the refusal, such affidavit shall be sufficient evidence in all courts that the offer has been made, or not agreed to. If the disagreement,

(*a*) 8 G. 4. c. 24. s. 12.
(*b*) Id. s. 13.
(*c*) Id. s. 14.

however, be only as to *price*, it shall be ascertained by a jury, in the same manner as in the case of the disputed value of premises taken under the act (*a*), and the expences of the hearing shall be borne as in the case of such purchases by the trustees, &c., *mutatis mutandis*. The money arising from the sale of the ground is to be applied by the trustees, &c., to the purposes of the act for maintaining and repairing the road; but the purchasers are not to be answerable for any misapplication or non-application of the money. The conveyances are to be made to the purchasers in the same manner as in the case of purchases of lands by trustees, as has been before mentioned (*b*).

Sales to be at the expense of trustees.

All sales and conveyances of any lands, &c., to be sold by the trustees, &c., shall be made at their expence, and expressed according to a particular form, which will be found in the Appendix (*c*).

And there is a similar provision in cases where trustees, &c., become possessed of any tenements or hereditaments which are useless or not necessary for the purposes of the road (*d*).

Direction posts and stones.

Guide posts and graduated stones are to be erected in highways.

For this purpose, and in order to facilitate the convenience of travellers, where several highways meet, the justices, at some special sessions held for the purposes of the act, shall issue their precept to the surveyor for any parish, township or place, where several highways meet, and where there may not be any proper or sufficient direction-post or stone, requiring him to cause a stone or post with inscriptions thereon to be forthwith erected or fixed in the most convenient place where such ways meet. The names of the next market town or towns or other considerable places to which the highways lead must be painted on each side in large legible letters. Further, graduated stones or posts denoting the depth of the water in the deepest part of such highways as are subject to deep or dangerous floods must be placed under the like authority at the several approaches or entrances to the same, together with such direction-posts or stones as the justices shall judge necessary for the guiding of travellers in the best and safest track through such floods or waters. The surveyor is to be reimbursed his expences in erecting such posts or stones out of such monies as he may receive by virtue of the act; but if he neglect to obey the precept for three months after it has been delivered to him,

(*a*) Ante, p. 120.
(*b*) Ante, p. 66. 3 G. 4. c. 126. s. 89.
(*c*) 4 G. 4. c. 95. s. 55. Appen. Tit. CONVEYANCES.
(*d*) Id. s. 63.

he shall forfeit 20*s.* for his default in not causing such posts, &c., to be erected (*a*). A provision for such reimbursement is declared in a subsequent section; it is the same as in the case of getting materials, and has been already laid before the reader (*b*).

Mile stones, &c. on turnpike roads.

These improvements, with others, are required on turnpike roads. The trustees, &c., are commanded to set up stones or posts near the sides of every turnpike road, at the distance of one mile from each other, denoting the distance of each stone from any town or place, and also such direction-post at the several roads leading out of any such road, or at any crossings, turnings, or terminations thereof, with inscriptions thereon, denoting to what place the roads lead, of such height and size, and in such situation as they may think proper. Further, they must cause to be printed in legible characters on some wall or board at the entrance of every town or village, the name of such town or village, and also cause stones to be put up, marking the boundaries of parishes where such boundaries shall cross any turnpike road. They shall also from time to time repair or renew such stones, posts, and boards, and continue the aforesaid inscriptions legible (*c*).

Penalty for defacing mile-stones, &c.

A penalty not exceeding 10*l.* is imposed on any person who shall wilfully break, cut down, pull up, or damage any such posts, stones or boards, or shall obliterate, deface, spoil, or destroy any of the letters, figures or marks inscribed or painted thereon, or on the walls, if he be convicted before a justice of the county, &c., where the offence is committed, either on the confession of the party, or by the oath of one credible witness (*d*).

Consent to turnpike bill by affidavit.

All persons concerned or interested in any bill for making or repairing a turnpike road, or widening or diverting a road, may signify their consent to the same by affidavit, taken and authenticated according to the form prescribed (*e*), unless the committee of either house of parliament to whom such bill, or the petition of such bill, shall be referred, shall otherwise order (*f*). Any justice, or master extraordinary in Chancery, may take affidavits on oath or affirmation (which oath or affirmation the act gives them power to administer) of the answers which may be given by the owners and occupiers of land on application made to them for their consent to such bills according to a certain form *. No such affidavit shall be liable to stamp duty, unless

(*a*) 13 G. 3. c. 78. s. 26.
(*b*) Ante, p. 104.
(*c*) 3 G. 4. c. 126. s. 119.
(*d*) Ibid.
(*e*) See post in the Appendix, Tit. Affidavit.
(*f*) 3 G. 4. c. 126. s. 151.
* See ante, note (*a*), and Appendix, as above.

the act of parliament imposing the stamp shall especially name it, and so make it subject to duty (*a*). Proof of the hand-writing of the justice, or master extraordinary before whom such affidavit shall be made, shall be evidence of the signature of those persons, without producing any witness who was present at the time of making the affidavit, and without shewing that the person was either a justice or master extraordinary (*b*).

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*Section II.—Of the Management of Ways: more particularly of Highways *, and Turnpike Roads †.*

The management of highways and turnpike roads is principally regulated and carried on by the following persons in authority:

I. Justices of the peace.

(*a*) 3 G. 4. c. 126. s. 152.
(*b*) Id. s. 153.

* *Exemptions from the operation of the highway act.* The parish of St. Mary Matfelon, otherwise Whitechapel, and St. John of Wapping, in Middlesex. 13 G. 3. c. 78. s. 87. And further, the highway act is not to extend, to alter, restrain, or abridge the power of the commissioners of sewers, or to vary or alter any of the provisions or regulations in acts of parliament relating to those commissioners. 13 G. 3. c. 78. s. 88.

† *Exemptions from general turnpike acts.* It having been doubted whether certain roads were within the provisions of the turnpike laws, it was enacted, that 3 G. 4. c. 126, and 4 G. 4. c. 95, should not extend to any roads *not under the care or management of trustees or commissioners;* nor to any road formed under the provisions of any act passed for an unlimited period, notwithstanding that tolls may be collected on such road. The two acts above, moreover, shall not affect the qualifications of any commissioners, &c. having the management of such last mentioned roads, or tolls taken, or weights carried thereon, nor shall they interfere in any other manner therewith. 4 G. 4. c. 95. s. 90. Neither shall they extend to the Shrewsbury and Bangor Ferry-road act, 59 G. 3. c. 30, nor to 59 G. 3. c. 48, concerning advances of money towards the repair of the London and Holyhead road, nor to any road maintained under the provisions of the last-mentioned acts. 4 G. 4. c. 95. s. 91. Neither shall they extend to the Commercial Road, in their several branches from and out of the same, as regulated by various acts of parliament, nor to the tolls, &c. erected thereby. 3 G. 4. c. 126. s. 149. 4 G. 4. c. 95. s. 92. Nor shall they extend to the act for improving the road from Glasgow to Carlisle, nor to the three several acts amending the same. 3 G. 4. c. 126. s. 150. Only, that so much of that last-mentioned road as lies in Cumberland shall be subject to the provisions of 3 G. 4, as far as they relate to nuisances, annoyances, and trespasses, and the justices of Cumberland are authorized to enforce all penalties for nuisances, &c. on that road within the county of Cumberland. 4 G. 4. c. 95. s. 93. The 7 & 8 G. 4. c. 24. s. 20, confirms all the clauses of the above statutes so far as they are not altered or affected by such new act, and consequently the exemptions above mentioned are preserved. And it is expressly declared in the last statute on the subject of roads, that it shall not extend to the Commercial Road with its branches, nor to the road from Glasgow to Carlisle. 9 G. 4. c. 77. s. 20.

II. Trustees or Commissioners of turnpike roads.

III. Surveyors.

IV. Treasurers and Clerks of turnpike roads.

V. Collectors of tolls.

We propose first, to treat of the powers and acts of each of these in their order; secondly, to speak of tolls; and thirdly, to mention the remedies which may be had for or against the persons above described respectively, together with the *general* penalties and forfeitures under the highway or turnpike acts, with the manner of recovering them.

I. Of the respective persons having authority in the management of roads.

1. Justices of the peace.

Magistrates are invested with extensive authorities, both under the highway and turnpike laws. Many of their powers have been already treated of in different parts of our undertaking, and such as we propose to mention here apply generally to our subject, and are not necessarily connected with any particular branch of it.

Justices of cities.

Thus, by the highway act, justices of *cities, corporations, boroughs,* and other places, (that is, places having a peculiar jurisdiction,) are required to put the act in execution within their respective jurisdictions (*a*).

Special sessions.

Again, two or more justices of the peace may hold and adjourn special sessions to fulfil the purposes of that act, causing notice to be given of the time and place of holding them (*b*), of which notice much has already been said (*c*).

Justices to settle damages.

Under any act for making or maintaining a turnpike road, if any damages or charges are directed to be paid or recovered in addition to any penalty for any offences, the amount of such damages, &c., in case of dispute, shall be settled by the justice before whom the offender is convicted, and the justice, in case of nonpayment, shall levy such damages, &c., by distress and sale of the offender's chattels, as is prescribed by the act of 3 G. 4., for the levying of any penalties, &c. (*d*).

(*a*) 13 G. 3. c. 78. s. 54. The same provisions are enacted by 54 G. 3. c. 109, s. 8. for the due performance of that act also.
(*b*) 13 G. 3. c. 78. s. 62.
(*c*) Ante, pp. 65, 118.
(*d*) 4 G. 4. c. 95. s. 69.

Justices of the peace for the county through which any turnpike road passes shall be added to and joined with the trustees, &c., for making, maintaining, and repairing the road, and shall have the same powers as though they were elected trustees (*a*). By a subsequent act these powers are extended to the justices of ridings, divisions, or sokes, as well as to those of counties (*b*). Certain oaths of qualification were imposed by the act of 3 G. 4., but it was afterwards enacted, that nothing in the above statute should extend to require a justice to take or subscribe any oath of qualification before he might act as trustee in the execution of any acts for making, repairing, or maintaining any turnpike road (*c*).

Justices may be trustees of turnpike roads.

Justices may act, although they be *personally interested*, unless it be otherwise than as a *trustee, commissioner, mortgagee, assignee, lender of money,* or *holder of any security on the credit of tolls* (*d*).

When any oath or affirmation is required under any turnpike acts, the justices of the county, &c., or the trustees, &c., of the road (as the case may be) and according to the several jurisdictions given them respectively by the act, are empowered to administer such oath or affirmation (*e*).

Justices to administer oaths.

Secondly, we proceed to speak of the trustees of turnpike roads.

2. Trustees or commissioners of turnpike roads.

Trustees, before they can act, are liable to qualify, which they must do in the following manner. They must take an oath, before one or more of the trustees, &c., or affirmation (if Quakers) that they will execute their offices to the best of their judgments (*f*). And if any one shall act before taking such oath, &c., except in administering the oath, &c., (the trustees being empowered to administer the same,) he shall forfeit 50*l.* and full costs, to any person informing or suing for the same at Westminster, by action of debt or on the case, bill, suit or information, wherein no essoign, protection, or wager of law, or more than one imparlance shall be allowed. But no act done by such person so neglecting the oath shall thereby be impeached or rendered nugatory (*g*).

Qualifications.

Quakers, being qualified according to the rule which we shall immediately state, are not liable to this penalty, their affirmation

Quakers.

(*a*) 3 G. 4. c. 126. s. 61.
(*b*) 5 G. 4. c. 69.
(*c*) 4 G. 4. c. 95. s. 34.
(*d*) 3 G. 4. c. 126. s. 64.
(*e*) Id. s. 146.
(*f*) 4 G. 4. c. 95. s. 32, and see post Appendix, tit. OATH.
(*g*) s. 32.

being sufficient; but they must make such affirmation, or they will be equally subject to the forfeiture (*a*).

Property.

The qualification as to property comes next. No person chosen or appointed shall be qualified unless he be in the actual possession or receipt of 100*l.* *per annum* of the rents and profits of *freehold* or *copyhold* lands, tenements, or hereditaments, above reprizes [deductions] *in his own right*, or in *right of his wife*, or unless he be heir apparent of such a land owner, having 200*l.* annually. Further, he must take an oath or subscribe an affirmation before any two or more trustees, &c. (such trustees, &c., being empowered to administer, &c.) that he is so qualified (*b*). But one may be a trustee, &c., of any road within ten miles of the Royal Exchange, who may be possessed of personal property to the amount or value of 10,000*l.* after the payment of all debts (*c*). There is the same penalty on persons acting without taking this last oath, as in the case of neglecting the former, and it may be recovered in the same manner, and the same provision is made, that no act done should, nevertheless, be impeached for want of such last-mentioned oath (*d*).

The old turnpike act of 13 G. 3., fixed 40*l.* per annum, in lands, or 80*l.* per annum, if an heir apparent, or 800*l.* personals, as the qualification. The new act respected this qualification as to such persons as were then acting by virtue of it. Therefore, whoever was duly qualified previous to January 1st, 1823, either by that or any other act previous to that day, and was then acting as a trustee, &c., was permitted to continue in his office without requalifying or taking the prescribed oath, although he were not possessed of the amount of property required by the new act (*e*).

Trustees losing qualification not to act.

However, it is provided, generally, that if any trustee, &c., shall lose or part with his qualification under the old and new acts respectively, by sale, assignment, bankruptcy, insolvency, or otherwise, he shall be disqualified and incapable of acting any longer. The trustees acting before the 1st of January, 1823, must lose their qualification under the old acts, and such as have acted since, must lose the increased qualification in order to their being rendered thus incapable. The penalty for acting after being thus disqualified is the same as for neglecting the oath, or acting without qualifying as above, and may be recovered in like manner (*f*).

(*a*) 4 G. 4. c. 95. s. 33.
(*b*) 3 G. 4. c. 126. s. 62.
(*c*) Id. s. 63. We have seen, that these oaths of qualification do not extend to magistrates. Ante, p. 131.
(*d*) 3 G. 4. c. 126. s. 61.
(*e*) 4 G. 4. c. 95. s. 35.
(*f*) Id. s. 36.

Trustees interested, or keeping a victualling house, not to act.

No trustee appointed shall be capable of acting as such in any case where he shall be *personally interested*, (except as we shall see hereafter,) nor during the time he shall keep a victualling, or other house of public entertainment; or shall sell wine, cider, beer, ale, spirituous, or other strong liquors by retail *; or shall be a lessee or farmer of the tolls on any road. The penalty for disobeying this provision is the same as above, so often adverted to, and may be recovered in the same manner (*a*). Provided, however, that no mortgagee or assignee of any mortgage or other security, or any lender of money upon the credit of the tolls, or receiving interest thereout for the same, shall be deemed on that account to be unqualified (*b*). And a justice may act although he be such mortgagee, &c. as we have seen (*c*).

Exceptions.

Trustees not to hold places of profit, or be concerned in contracts, &c.

No trustee, &c. may enjoy any office or place of profit under any act in execution of which he shall have been appointed, or shall act as such trustee, &c.; nor may he have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road; or for building or repairing any toll-house, toll-gate, or weighing engine thereon, or supplying materials for the use of it; nor may he let out for hire any waggon, wain, &c. or any horses, &c. for the use of any road for which he shall act; nor receive, by himself, or any other person on his account, any sum directly or indirectly to his use or benefit out of the tolls.

Penalty.

Should he hold any such office, &c. after his appointment to be a trustee, &c. without having first duly resigned his situation at some meeting of the trustees; or be concerned in any such contract, or sell any such tools or implements, or let out for hire any waggon, &c. or do any of the other things above forbidden, he shall forfeit 100*l.* to any person who shall sue for the same, and be incapable, after conviction, of acting as a trustee, &c. Moreover, all his acts, orders, &c. shall, after conviction, be null and void, and every such illegal contract is declared to be void, and shall not be enforced either against or by the other trustees, &c entering into the same, but *acts, orders,* &c. done by the offending trustee *before* conviction shall be valid (*d*). One *H.* contracted with the trustees of a road to make certain improvements thereon for a specific sum. The defendant, a trustee, subsequently agreed with *H.* to let him his horses and cart at

Contracts void.

* No seller of wine, ale, spirituous liquors, or provisions by retail, shall be capable of holding any place of profit under any trustees, &c. of any turnpike road. 3 G. 4. c. 126. s. 75.

(*a*) Id. s. 64.

(*b*) Ibid.

(*c*) Ante, p. 131.

(*d*) 3 G. 4. c. 126. s. 65. But no *contract*.

the rate of 5*s.* per day: they were so let, and used on that part of the road which *H.* was to improve. It was contended for the defendant, in an action of debt, that this was a sub-contract with the contractor, made *diverso intuitu* from the contract entered into by *H.*, and that it was for a specific sum, which would make the matter indifferent to the Commissioners. But, although there was judgment of nonsuit against the plaintiff on other points, the court held this conduct to be within the spirit and words of the act. The consequence of holding otherwise would be, that if several persons should offer to do the work, it would become the interest of the trustee to give an undue preference to the person who is willing to hire his horses and carts; and here, again, the defendant actually let out his cart and horses for the use of the turnpike road, for which he acted as a trustee (*a*).

Exception.

The following are exceptions to the above prohibition. Any sum may be paid to such trustee, &c. out of the tolls by way of purchase-money; any damages, rent, recompence or satisfaction agreed upon or awarded to such trustee, &c. for any land, &c. purchased or taken for the purpose of diverting or altering, or for the use of the road for which he shall act; or for a repository for materials to be used on it, or for the damages done to any inclosed or private grounds of any such trustee, &c. in taking materials, or carrying or conveying them, or for any materials, or any timber grown or growing on the lands of such trustee, and sold by him for the use of the road (*b*).

Notwithstanding this, doubts were entertained as to the extent of a trustee's liability, and it was, therefore, declared by a subsequent statute, that no trustee should be deemed or taken to be *personally interested*, for having *acted* in ordering the making, altering, or diverting any turnpike road over or contiguous to any lands, &c. in his possession or occupancy, or by reason of his having received any money *for any timber or wood, or materials*, purchased or taken for the purpose of *making, diverting, or altering*, or for the use of the road for which he shall act as a trustee. The other exceptions mentioned above are reenacted (*c*). So that by this new provision the trustee may himself join in the order.

Trustees having shares in canal companies which

There is another exception. A proprietor, or holder of shares in any canal or railway company, which shall contract with the trustees, &c. of the road for which such proprietor shall act as a trustee for the conveyance of any materials for the repair of the

(*a*) 5 B. & C. 125, Towsey v. White.
(*b*) 3 G. 4. c. 126. s. 65.
(*c*) 7 & 8 G. 4. c. 24. s. 1.

road, is excepted, and declared not liable to the forfeiture of 100*l.* above mentioned (*a*). convey materials, excepted.

The mode of appointing new trustees is pointed out. For should any trustee die, or become disqualified by bankruptcy, insolvency, or otherwise, or, by writing under his hand, refuse to act, (justices always excepted,) the other trustees, &c. may elect another fit person, being qualified. But, in the above cases, at least fourteen days' notice of the time and place of meeting for such election must be given by the clerk to the trustees, &c. by affixing it in writing upon all the toll-gates or turnpikes on the road within the jurisdiction of such trustees, and by inserting the notice in one or more of the newspapers circulating in that part of the country where the road passes. Such election shall confer the same powers as though such newly appointed trustee were named in the act of parliament (*b*). Appointment of new trustees.

Having mentioned the qualifications of trustees, we come to speak of the mode of holding their meetings. They are empowered to meet from time to time, at any time and place on or near their roads, as may be convenient, and may in like manner adjourn themselves as they, or the major part of them present at a meeting, shall appoint. They are to pay their own expenses at such meetings, except a sum which may not exceed 10*s.* * per day for the use of the room in which they meet. All orders and determinations of the trustees, &c. in the execution of the turnpike acts must be made at such meetings, and not otherwise, (except in cases otherwise particularly provided for,) but no order shall be made unless the majority of those present concur. Three are to be a quorum, and all acts and authorities are to be done and exercised by the majority of trustees present, (except in such cases where any other number is named for any particular or special purpose by any local or general act.) Such orders, &c. to be of the same force as though the whole body of trustees were present. A chairman is first to be appointed at a meeting under any general or local act, and he is to have the casting vote. It is further declared, that no order, &c. shall be revoked or altered at any subsequent meeting, unless notice to that effect shall have been given in writing by three or more trustees, &c. to the clerk of the trustees, &c. at a previous meeting holden for the same road, and entered in the book of the proceedings of such meeting. And further, unless notice signed by any two or more trustees, &c. shall have been affixed on all the turnpike gates on the road twenty-one days at least before such meeting, nor unless such re- Meetings of trustees.

(*a*) 4 G. 4. c. 95. s. 37.
(*b*) 3 G. 4. c. 126. s. 66.
* Trustees of any road within five miles of the Royal Exchange may expend twenty shillings *per diem*. 4 G. 4. c. 95. s. 39, at the end.

vocation or alteration shall be agreed to be made by a greater number of trustees, &c. than concurred in the making of the order (*a*).

Meetings on emergencies.

Should it, however, be deemed necessary that the trustees, &c. should meet before the time of adjournment, any two or more trustees (or the clerk, by an order in writing, signed by any two or more) may give notice of such earlier meeting by advertisement in some newspaper circulated in the neighbourhood of the road, and affixed on all the turnpike gates on the road, expressing the time, place, and purpose of such earlier meeting, (such time not being less than fourteen days from the publication of the notice,) and all the orders made at this last meeting shall be valid, provided that no other business than that specified in the notice be transacted there (*b*).

General annual meeting.

A general annual meeting is directed to be holden in the months of April, September, or October, on a day to be appointed by the trustees, &c. or any three of them. Twenty-one days' notice of this meeting must, however, be given by inserting the same in some newspaper usually circulating in the county where the road or roads lie, the said meeting to be called, or known as, "the general annual meeting of the trustees or commissioners." At such meeting a chairman is to be elected, the accounts are to be audited, and the state of the roads reported (*c*).

Default of attendance.

Should a sufficient number of the trustees, &c. not meet on the day appointed by any act for their first meeting, or should such number not meet on the day appointed by adjournment for their meeting, so that the intent of the act might thereby be frustrated, as many trustees, &c. as shall meet, or the major part, or their clerk, in case no trustee, &c. be present, shall cause notice in writing to be affixed on all the turnpike gates on the road, or, if no turnpike gate be erected, in the most conspicuous place in one of the principal towns or places nearest to which the road lies, and, also, to be inserted in some public newspaper circulated in the county in which the road is situate, ten days at least before the intended meeting, and appointing such trustee, &c. to meet at the place where the preceding meeting was appointed to have been held. Such trustees, &c. meeting pursuant to the last-mentioned notice are to carry the act or acts into execution in the same manner as if no neglect had happened (*d*).

And whereas it has happened, that trustees, &c. have not been able to meet on the day appointed by the act, by reason

(*a*) 4 G. 4. c. 95. s. 39.
(*b*) Id. s. 41.
(*c*) 3 G. 4. c. 126. s. 69.
(*d*) Id. s. 70.

that the day appointed for the meeting has been antecedent to the passing of such act; in such case three or more of the trustees, &c. may meet at the place appointed for the first meeting on the 14th day after the passing of any act, and such meeting shall be good to all intents and purposes whatsoever (*a*). And, again, if trustees have holden their annual meetings under any act of parliament at other times of the year than in the months of April, September, or October, such meetings may be continued as directed by the act under which they may be appointed, instead of being holden in April, &c. (*b*).

Orders, &c. to be kept in a book.

Lastly, all orders and proceedings of the trustees, &c. together with the names of the trustees, &c. present at every meeting, shall be entered in a book kept by the clerk to the trustees for that purpose, and shall be signed by the chairman of the meeting at which such be from time to time had. The book shall be open at all seasonable times to the inspection of any trustee, &c. without fee or reward, and such orders, &c. so entered and signed by the chairman as aforesaid shall be deemed to be original orders, &c. (*c*). And, by a very recent statute, all books kept for registering mortgages, or assignments, and all entries therein, and all books containing the accounts and proceedings of the trustees in the execution of any turnpike act, and made evidence thereby, shall be admitted in evidence in courts, and by all judges, justices, and others, without proving the facts therein contained, unless such facts, or any of them, shall be first controverted, notwithstanding any former acts, under the provisions of which such books may have been originally kept, may be repealed; and all such books shall be preserved by the clerk of the trustees, and be open to their inspection at all seasonable times, and also to the inspection of the creditors of the tolls, without fee or reward. The trustees, &c. are to be permitted to take copies, &c. without payment; and the clerk is to forfeit 5*l.* on refusal to allow the trustees, &c. such inspection (*d*).

Books of account.

Having mentioned books, it may be added, that the trustees, &c. are bound to order a book to be kept by their clerk, who must enter true and regular accounts of the receipts and payments on the account of the road, and of the several items. This book shall be open to the inspection of the trustees, &c. at all seasonable times, or to any creditors of the tolls, without fee or reward. The trustees or creditors may take copies or extracts from the book without paying, and the book shall be produced by the clerk at all meetings of the trustees, &c. (*e*)

(*a*) 4 G. 4. c. 35.
(*b*) 4 G. 4. c. 95. s. 42.
(*c*) 3 G. 4. c. 126. s. 72.
(*d*) 9 G. 4. c. 77. s. 2.
(*e*) 3 G. 4. c. 126. s. 73.

Penalty on clerk.

If any clerk shall refuse, or shall not permit any trustee, &c. or creditor to inspect the book, or take copies, or shall neglect or refuse to produce it, he shall incur a forfeiture of 5*l.* to be levied and applied in the same manner as other penalties under the act (*a*).

Accounts to be audited at general annual meetings.

The trustees, &c. are, moreover, required to examine, audit, and settle the accounts of the treasurers, clerks, and surveyors, at their general annual meeting, and to require those officers to produce their books, accounts, papers, and vouchers, and to examine* into the revenues and debts of the roads for which they act as such treasurers, &c., distinguishing bond from simple contract debts. The accounts being settled and allowed, the chairman of the meeting shall sign them (*b*).

Penalty on officers.

If the above mentioned officers should refuse or neglect to produce their accounts, &c. they may be dealt with according to the provisions enacted with regard to officers refusing to account, or deliver up books or papers, or pay over money in their hands, which we shall presently advert to (*c*).

Statement of revenue to be transmitted to the clerk of the peace.

Such accounts being audited, allowed, and signed, the clerk shall forthwith make out a statement of the debts, revenues, and expenditure, received or incurred on account of the trust in the form contained in a schedule annexed to the act (*d*). Such statement shall be submitted to the trustees, &c. assembled at the meeting, and, when approved by the majority, shall be signed by the chairman; and, being approved and signed, the clerk shall transmit it within thirty days to the clerk of the peace for the county in which the road, or the major part to which the statement relates, shall lie (*e*).

Penalty on clerk.

The neglect to make out the statement, or to transmit it, is punishable by a forfeiture of 50*l.*, to be recovered like other penalties under the act, where no specific mode of proceeding is pointed out (*f*). Then the clerk of the peace, on receiving this statement, shall cause it to be produced to the justices at the quarter sessions held next after the receipt of it, and shall have it registered and kept among the records of the sessions. Such statement when registered is to be open to any person's inspection, who may take extracts or copies, paying 5*s.* for the inspection, and 6*d.* for every seventy-two words of each extract or copy to the clerk of the peace (*g*). After the accounts have been ex-

(*a*) 3 G. 4. c. 126. s. 73. See post, in this Chapter.
* That is, such officers to examine, &c.
(*b*) 3 G. 4. c. 126. s. 78.
(*c*) Post, p. 139.
(*d*) See post, Appendix, tit. GENERAL STATEMENT.
(*e*) 3 G. 4. c. 126. s. 78. post, in this Chapter.
(*f*) Ibid.
(*g*) Id. s. 79.

amined, audited, and signed, the trustees must cause a sufficient number of copies of such statements to be printed; and must direct their clerk to transmit a copy to each acting trustee, &c. who has duly qualified himself to act as such trustee, &c. (*a*).

Officers of the road generally to account when required.

Indeed, all officers of the road must account upon demand. The act declares, that they shall, from time to time, when required by the trustees, &c. deliver to such trustees, &c. or to their appointees, true, exact, and perfect accounts, in writing, under their hands, of all receipts and disbursements, and for what purposes. They must also deliver the proper vouchers for their payments, and pay over monies remaining in their hands to the trustees, or their appointees, and not otherwise, within such time as such trustees, &c. may appoint (*b*).

Proceedings upon neglect.

Should any such officer or person refuse or neglect to produce or deliver up such accounts, and vouchers, or pay the money due on such account within the time given, or in the proper manner, or make default in delivering up to the trustees, &c. or persons appointed by them, within ten days after being required, all the books, papers, or writings in his custody or power, relating to the execution of any act—any justice of the county, &c. where the road is, shall, on complaint by or on behalf of the trustees, &c. summon, by warrant, under his hand and seal, such officer, &c. before him, and hear and determine the matter, whether the party appear or not, and settle the accounts if produced. Moreover, if, on confession of such officer, &c., or upon the oath of any witness, (such justice being empowered to administer the oath without fee or reward,) or upon inspection of the accounts, if produced, it shall appear to the justice, that any of the money collected or received shall be in the hands of such officer, &c. the justice shall, on non-payment, by warrant under his hand and seal, cause the money to be levied by distress, &c.; and if no goods be found sufficient to answer the sum required, and the costs of distress; or, if the party shall not appear, without sufficient reason of absence; or, if appearing, shall refuse or neglect to give an account of the receipts and payments, or to produce and deliver up the vouchers, or the books, &c.; then the justice shall commit such officer by his warrant, under hand and seal, to the common gaol or house of correction of the county where the road is. In case of commitment for non-payment of money received, the offender shall remain there without bail or mainprize until he shall have accounted for and paid the full amount, or compounded with the trustees, and shall have paid the composition according to their appointment (such trustees, &c. are declared capable of compounding); but in case of a committal for not delivering up books, &c. then, until the delivery of such books, &c. or until he

(*a*) 3 G. 4. c. 126. s. 80.
(*b*) 4 G. 4. c. 95. s. 47.

shall have made satisfaction in respect thereof to the trustees, &c. But he shall not be detained, *if committed for want of sufficient distress,* for more than six calendar months (*a*). And, by a late act, all persons who may be, or shall have been employed, or who shall have received any tolls or other money on account of or for the purposes of any turnpike act expired or repealed, or who may have or shall have had in their custody or possession any money, books, papers, writings, or other things relating to any such road, shall account for and pay and deliver over the same to the trustees for executing any subsequent act, in like manner, and under the same penalties, as collectors, &c. receiving money under the turnpike acts, are required to pay or account (*b*). And again, every constable, headborough, or tithing man, refusing or neglecting to put turnpike acts into execution *, or account for or deliver any forfeiture, &c.; and every *surveyor* of any turnpike road, and every *toll collector,* and all other persons employed, or to be employed, by any trustees, &c. and receiving salaries or rewards, who shall neglect wilfully for one week after any offence committed within their knowledge to lay such information on oath before a justice of the limit, shall, upon due information on oath before a justice as aforesaid, forfeit 5*l.* for every neglect (*c*). Lastly, any trustee, &c. or their clerk, collectors, surveyors, or other officers, together with such other persons as may be called to assist, may, without warrant or other authority than the act, seize and detain any unknown person who has committed an offence, and take him before a justice for the county, &c. near to the place where the offence has been committed, or the offender has been seized and apprehended. Such justice to proceed and act with respect to such offender according to the provisions of the respective acts (*d*).

Officers are to be appointed by trustees.

These officers are to be appointed by the trustees. The appointment is to be in writing, and the act declares that they shall so appoint the collector of tolls, the clerk, the treasurer, the sur-

(*a*) 4 G. 4. c. 95. s. 47.

(*b*) 9 G. 4. c. 77. s. 14. Vide suprà as to the manner of doing this, and the penalties.

* The words of the act referred to are "*this* act," but we have used the general expression of turnpike acts, because the subsequent statutes confirm the powers of the act of 1822, and extend them to the provisions respectively contained in such subsequent acts. See 4 G. 4. c. 95. s. 88. 7 & 8 G. 4. c. 24. s. 20. 9 G. 4. c. 77. s. 19. This observation applies to many other general expressions of the same kind, inasmuch as the statutes just referred to confirm the powers of the act of 1822, and of other acts respectively in all matters not therein altered or repealed. It is, moreover, declared by 9 G. 4. c. 77. s. 19, that all the powers, &c. of the act shall extend to every local turnpike act, and be as effectual as if reenacted in the body of such act, and that the act of 1822, &c. shall not be recited in such act, save as to such powers, &c. which may be referred to for the purpose of being varied, altered, or repealed.

(*c*) 3 G. 4. c. 126. s. 136.

(*d*) 3 G. 4. c. 126. s. 140.

veyor, and such other officers as they may think necessary (*a*) * only they may not either continue or appoint their clerk, or his partner, or any clerk, or other person, in the employ of their clerk or his partner, to be their treasurer, or *vice versâ*, and a severe penalty is inflicted on any person accepting both those offices at the same time. For the penalty of 100*l.* is awarded against any one guilty of that offence, or against any partner of the clerk, or against any clerk or person in the employment of the clerk to the trustees, whether he accept the office of treasurer, or deputy, or if he in any way officiate; and it is also awarded against the partner of any treasurer, or the treasurer's clerk or servant, who shall accept the office of clerk, or act as deputy, or in any manner officiate; and, lastly, against any treasurer who shall hold any place of profit or trust under the trustees, other than that of treasurer. Such penalty is to belong to any person who will sue for the same, and to be recovered with full costs, at Westminster, by action of debt, or on the case, or by bill, suit, or information, wherein no essoign, &c. shall be allowed (*b*). Treasurer and clerk to be separate persons, &c.

And, moreover, the trustees may not continue or appoint their clerk, or his partner, &c. to be their *surveyor*, or *vice versâ*. If the surveyor accept any other office of profit or trust than that of surveyor, he shall forfeit 50*l.* to be recovered as directed in the last section referred to (*c*). The trustees, however, may remove their officers, and may appoint others on the removal, death, or resignation of any officer, and, further, they may allow and pay them, or their assistants, such salaries, rewards, and allowances, for their attendance, &c. out of monies arising on the roads, as they may deem reasonable (*d*). Surveyor and clerk to be separate persons, &c. Salary.

Again, they are required to take sufficient security, before he shall enter upon his office, from any treasurer for the due and faithful execution of it; and, if they see fit, may take such security from any other officer appointed by virtue of any turnpike act (*e*). Security.

The trustees, &c. are empowered at any of their meetings to order cranes, machines, or engines, to be built and erected at May erect weighing machines.

(*a*) 4 G. 4. c. 95. s. 43.

* If an act be repealed, these officers are, nevertheless, to hold their situations until the trustees remove them. Thus, the treasurer, if appointed consistently with 3 G. 4, 4 G. 4, and 7 & 8 G. 4, and every clerk, &c. and other officer appointed, &c. under any act which *may have expired, or may have been repealed*, shall remain in office until removed by the trustees for executing any subsequent act. Such officers are to have the same powers, to be subject to the same penalties, to the like powers of removal, and the like rules, as though they were appointed under such subsequent act. 9 G. 4. c. 77. s. 15.

(*b*) 7 & 8 G. 4. c. 24. s. 4. 3 G. 4. c. 126. s. 71. The penalty by the former statute is 100*l.* instead of 50*l.* as inflicted by 3 G. 4.

(*c*) 4 G. 4. c. 95. s. 44.

(*d*) Id. s. 43.

(*e*) 3 G. 4. c. 126. s. 76.

any gates under their management, or at such distance therefrom as they may think expedient, with a suitable house or other building thereto, which shall be proper for the weighing of waggons or carriages conveying goods, and they may order, by notice on a board for that purpose to be put up at any such weighing machine, that such waggons or carriages arriving within one hundred yards of the crane, &c. should be weighed, together with their loading (*a*). Should two or more turnpike roads meet at or near the same place, the trustees of such roads respectively may fix upon a convenient place, at some meeting held for that purpose, for the erecting of a weighing machine which will accommodate all such roads; and by an agreement amongst themselves at such meeting, they may proportion the expenses attending the making, erecting, maintaining, and keeping of such weighing engine, and also the money arising for forfeitures incurred for overweight, among all such roads, in such manner as shall appear to them to be just and reasonable (*b*).

Other powers possessed by the trustees of turnpike roads, as their jurisdiction over tolls, and toll-gates, their competency to mortgage tolls, &c. will be mentioned at large in a future part of this Chapter. So, also, their liabilities to be sued, and the particular actions to which they are exposed, will be noticed at length in the same place.

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3. Surveyors of highways and turnpike roads.

The surveyor is an officer of considerable authority both of highways and turnpike roads. Some of his duties have been already discussed, especially such as are connected with the repair of ways, but the mode of his appointment, and the regulation of his accounts, deserve particular consideration. Other circumstances relating to him, and authorities with which he is interested, will also be laid before the reader.

Appointment of surveyor of highways.

The appointment of a surveyor of the highways is to take place as follows:

Annually on September 22, (unless Sunday,) and then on the day following, the constables, headboroughs, tithingmen, churchwardens, surveyors of the highways, and householders *,

(*a*) 3 G. 4. c. 126. s. 21.
(*b*) Id. s. 25.

* In a case under the old act of 7 G. 3, there was not any churchwarden, nor tithingman, nor headborough, nor constable, present at the meeting, and it was consequently said, that the list returned to the justices was not a regular list. But the court, although they did not decide the point, inclined very strongly, that the legislature only intended a full parochial meeting, without meaning that each of these bodies should be such essential constituent parts of it. 4 Burr. 2452, Rex v. Pettiward and others. And by Aston, J. "A constable might perhaps *die* just before the meeting, or might perhaps absent himself on purpose to frustrate the effects of the meeting, and it was not probable that the legislature meant that such absence should render the acts of the meeting null and void." 4 Burr. 2451.

being assessed to any parochial or public rate, of any parish, township, or place, shall assemble at the church or chapel of such parish, &c. or at the usual place for public meetings, (if no church nor chapel,) at 11 a. m. The major part of these shall make a list of ten persons at least, living within such parishes, &c. having an estate in lands, tenements, or hereditaments, lying within such parishes, &c. in their own right, or in the right of their wives of 10*l.* per annum, or personal estate to the amount of 100*l.*, or who are occupiers or tenants of houses, &c. of 30*l.* annual value. Should there not be ten qualified persons, then the names of the qualified persons must be inserted in the list together with as many sufficient and able *inhabitants* as may make up the number wanting; if none be qualified, ten residents are to be returned. Such constables, &c. must, within three days after the meeting, transmit a duplicate of such list to a justice of the limit living in or near the parish, &c.; and shall, also, return and deliver the original list to the justices at their special sessions to be held for the highways in the week after the Michaelmas quarter sessions *. The constables are, further, to give personal notice, within three days after the making of the list, to the several persons named, or to cause written notices to be left at their places of abode, informing them of the nomination, so that they may appear at the special sessions, either to accept the appointment, should it take place, or to shew cause against it (*a*). Qualification.

The justices are required to hold such special sessions at such place as they may think proper, giving notice of the time and place to the constables, headboroughs, or tithingmen of the parish, &c. at least ten days before the holding of the sessions. And then, the justices may, by warrant under their hands and seals, appoint one, two, or more persons from the lists, according to their discretion, and the largeness of the parish, &c., should the parties in question be qualified: and if not, the appointment may be of one, two, or more substantial inhabitants or occupiers of lands, &c. †, within such parish, &c. living within three miles thereof, and in the same county, fit and proper to serve the office of surveyor. This appointment must be notified by the constables, headboroughs, or tithingmen, to every person so appointed within three days afterwards by serving him with the warrant, or leaving it, or a true copy, at his house or usual place of abode. Such person is to be, and to act as surveyor for one year. The justices shall *charge* the respective surveyors who appear personally before them upon the execution of their duties ‡. Should any person so appointed, however, and whose name is in the list, and Penalty on persons re-

* See ante, p. 99, n. The Michaelmas quarter sessions having been altered, a new statute declared, that the justices might do any act at their Michaelmas special sessions as before the alteration.

(*a*) 13 G. 3. c. 78. s. 1.

† Lands, tenements, woods, tithes, or hereditaments.

‡ This charge is a printed abstract of the most material parts of the highway act. See post.

refusing to serve.

who has been served with the notice, refuse or neglect to appear at the sessions, and accept the office, if appointed, or should he not signify his acceptance personally, or in writing, to one of the justices, within six days after being served with the warrant of appointment, he shall forfeit 5*l.* And if any person so appointed, whose name is *not* in the lists, refuse or neglect to accept the office, or fail to shew good cause to one of the justices signing the appointment why he should not serve, he shall forfeit 50*s.* Provided, that no person, who has been appointed and has served for one year, shall be again liable within three years from the time of his first appointment and service, unless he consent thereto (*a*).

What to be done if no list.

Should there be no list, or upon an appointment as above mentioned, should there be a refusal by the person appointed, the justices, or any two of them, are required at the same or some subsequent special sessions, to be held within one month afterwards, to nominate and appoint some other person to be surveyor, whom they shall think competent, and to fix a salary to be paid to him out of the forfeitures aforesaid, or any other forfeiture, assessment, or composition to be paid under the act within each respective parish, as the justices shall think fit; such salary not to exceed one eighth of what shall have been raised by an assessment of 6*d.** in the pound, for the use of the highways within the parish, &c. where any such assessment shall have been raised, and observing the same restriction as near as they can, from the best information they shall be able to get, of the probable amount of such an assessment, where none has been already made; and such justices, if they think fit, may require the constables, headboroughs, tithing-men, and surveyor of every such parish, &c. to return to them an account in writing, at such time and place as they shall appoint, of the sum which such assessment of 6*d.* hath raised, or will raise in the opinion of such constable, &c. (*b*)

Penalties for disobeying the directions in this section.

If the constables, &c. and householders shall neglect or refuse to make the aforesaid list, or if the constable, headborough, or tithing-man shall not return the list and duplicate, give the notices, and serve the warrants as above directed, or if the constable, headborough, tithing-man and surveyor shall neglect the return of the assessment, when required, every constable, headborough, tithing-man, churchwarden, or surveyor, so neglecting or refusing in any such case, shall forfeit 40*s.* for each default (*c*).

The magistrates, it should be observed, are not *bound* under the provision to appoint a surveyor from the persons returned in the lists. Where three surveyors were appointed for Battersea, one of whom was not in the list, a mandamus was moved for, to

(*a*) 13 G. 3. c. 78. s. 1.
* 1*s.* 9*d.* in the pound. 54 G. 3. c. 109. s. 3.
(*b*) 13 G. 3. c. 78. s. 1.
(*c*) Ibid.

compel the justices to elect another surveyor from such list. But the motion was denied, the court holding that any *other* person of the parish properly qualified might be appointed. Each of these persons, moreover, were respectively appointed for a particular division of the parish, and therefore it was further objected, that they were not made for the whole parish, but only for inferior districts within it. This objection however also failed, and the rule for a mandamus was discharged (*a*). Nevertheless, the justices must appoint a surveyor. Proper lists were returned upon one occasion, but in consequence of some dispute as to the accounts of the former surveyor, there was no new appointment. The magistrates doubted whether they could appoint at a subsequent sessions in this case, because the act directed such an appointment in two instances only, first, where no list was returned, and second, where the party refused to act. But Lord Ellenborough said, that there were no negative words to prevent their exercising their office in that respect at any subsequent sessions, and that common sense required the appointment which was sought. The rule was therefore made absolute (*b*).

Salary, how raised.

The surveyor's salary is to be raised in the same manner as the assessment for reimbursing him for materials bought for the use of the road (*c*).

Assistant surveyor.

It is further provided, that in all cases where the justices appoint a surveyor upon the neglect or refusal of him who was originally fixed upon, with a salary as we have mentioned, they must appoint one substantial inhabitant of the parish as an assistant surveyor, until the next annual appointment, and if this latter person shall refuse his office after notice, he shall forfeit 50*s*., and then any other substantial inhabitant may be so appointed, and should he also refuse, the like forfeiture is awarded. And in that case any other inhabitant of the parish, &c. may be appointed, and he shall be entitled to the last-mentioned forfeitures, and to some further allowance by way of salary, (to be paid as the surveyor's salary,) if the justices shall think such salary necessary, and shall order it. The assistant surveyor appointed for one year is not to be compelled to serve again for three years, without his consent (*d*).

Bond by surveyor, when to be taken.

If a salaried surveyor, being a non-resident, should take the office, the churchwarden or overseer, or any principal inhabitant of the parish, &c. may require him, at the time of his appointment, or within fourteen days afterwards, to give a bond upon

(*a*) 7 Term Rep. 169, Rex v. Baldwin and others. See post, in this chapter, that no certiorari will lie to remove the appointment of surveyors.
(*b*) 4 East, 142, Rex v. Denbighshire Justices.
(*c*) See ante, pp. 104, 106, 108.
(*d*) 13 G. 3. c. 78. s. 2.

paper, without a stamp, to some proper person within the parish, &c., to be nominated by the justices, with sufficient surety to account for the money which shall come to his hands as surveyor, such bond to be good and effectual in law (*a*).

Death, &c. of surveyor.

In case of a surveyor's death, or other incapacity for his office before the next special sessions for appointing such officer, the justices as aforesaid, or any two of them, may appoint another person at some special sessions, to act until the annual appointment, and may allow the successor the same salary as the deceased surveyor, if he had one, in proportion to the time he shall serve the office. Should the justices appoint more than one person to be surveyors of any parish, &c. all such persons shall be comprehended under the word surveyor, in every part of the act (*b*).

There is one other provision as to the appointment of surveyors, and it is where two parts out of three of those so to be assembled in any parish, &c. for the nomination of surveyors as aforesaid, shall agree in the choice of any particular person of skill and experience to serve the office, and in the settling of a certain salary for his trouble, and shall return the name of that person, together with the list, to the justices at their annual special sessions as aforesaid. In that case, the justices, if they think proper, may appoint that person, and allow him the salary mentioned in the agreement, which shall be raised and paid in the same manner as the salaries mentioned above (*c*). However, justices of *cities, towns corporate, or boroughs,* may not fix nor allow any salary for a surveyor unless it be such as has been settled and agreed upon by two parts out of three of the persons assembled in the parishes, &c. within such cities, &c. (*d*).

Bristol excepted.

Nothing in the act before us as to the making and returning lists, or the appointment of surveyors, nor the repeal of part of an act made in the third year of King William and Queen Mary relating to such surveyors, shall in any way extend to the city of Bristol, but the several acts of parliament passed previous to this act with regard to surveyors of highways within that city, and cleansing, paving, &c. there, shall remain in full force (*e*).

Printed abstracts of act to be given to surveyors.

In order to make the contents of the highway act more generally known, the justices within their respective limits are required, at the annual special sessions above mentioned, to procure and deliver, or cause to be delivered, a printed abstract of the most material parts of the act to any surveyor appointed by them, *as the*

(*a*) 13 G. 3. c. 78. s. 3.
(*b*) Id. s. 5.
(*c*) Ibid. Ante, p. 145.
(*d*) Id. s. 55.
(*e*) Id. s. 86.

charge directed to be given *. They were, moreover, directed, for the same end, to deliver to each surveyor at the same special sessions held in the year 1773 [the same year in which the act passed], one other printed abstract for the use of the parish, &c., which last-mentioned abstract the surveyor was to fix on the church or chapel door, or other public place on the Sunday after receiving it. The surveyors are to pay 6*d.* to each of the justices' clerks for such abstracts (*a*).

Duty of surveyor.

As we have before observed, much of the surveyor's duty has been already noticed. Other general duties, however, are prescribed by act of parliament. Thus, by the highway act, surveyors, when they think proper, shall view all the common highways, trunks, tunnels, plats, hedges, ditches, banks, bridges, causeways, and pavements within the parish, &c., and if they observe any nuisance †, encroachments, obstructions or annoyances, contrary to the act, and prejudicial to the road, they shall give notice to the offenders as soon as may be, either personally or in writing left at the usual place of abode of such person, and specifying the particulars of the offence. Should such nuisances, &c. not be removed, and the ditches, drains, &c. effectually scoured, &c., and the trunks, tunnels, &c. made and laid, and the hedges properly cut and pruned within twenty days after the notice, the surveyors are empowered to remove the nuisances, and do all those things for the improvement of the highways which ought to have been done as aforesaid. The person making default in cleansing the ditches &c., or cutting the hedges, after notice given, shall forfeit 1*d.* for every foot in length which has been neglected, and the surveyors shall be reimbursed their charges and expences in removing the nuisances, &c., and making the other improvements and cleansings by the person who ought to have done them, over and above the forfeiture. Should the defaulter refuse to pay the surveyor such expences, and also the said forfeiture of 1*d.* per foot, the surveyor shall apply to a justice, and after making oath of the notice given, and of the work being done in manner aforesaid, and of the expences, such surveyor shall be repaid by such defaulter all his reasonable charges as allowed by the magistrate, or in default of payment, the same shall be levied like other penalties and forfeitures under the act (*b*).

* See ante, p. 196.

(*a*) 13 G. 3. c. 78. s. 71.

† The surveyor of the pavements in the south west district of St. Pancras exhibited an information against a hackney coachman for taking his stand in Howland Street, and plying there so as to obstruct the carriage way. The commissioners of pavement were authorized by act of parliament to direct and regulate the stands of hackney coaches within the district. It was held, that the word "direct," meant appoint, and that they had power to order the removal of the hackney coach stand. 6 B. & C. 23, Rex v. Rawlinson, Esq.

(*b*) 13 G. 3. c. 78. s. 12, ante, p. 104.

Duty of assistant surveyor.

The assistant surveyor must assist the surveyor to the best of his skill and judgment whenever requested. He must aid in calling in and attending the performance of the statute duty, in collecting the compositions, fines, penalties, and forfeitures, in making and collecting the assessments, in making out and serving the notices authorized by the act, and in all other reasonable matters required of him by the surveyor in the execution of his office under the act. The assistant, moreover, must truly account with, and pay over to the surveyor, or his order, all the money which shall come to his hands as assistant, or forfeit double the value of his receipts. Wilful neglect or default on the part of the assistant in the performance of any duty required by the act, is punishable by a forfeiture of a sum not more than 5*l.* nor less than 40*s.*, at the discretion of the justice or justices of the limit within which the assistant has been appointed. The surveyor is, further, required to send orders in writing upon such assistant for the payment of all sums due to any person for work or materials under the act, which amount to 40*s.* or upwards, and the surveyor shall not be responsible for any sum received by the assistant, which shall not be actually paid to him the said surveyor, or to his order, as we have said above (*a*). The surveyor himself shall forfeit for any neglect of duty which is not otherwise provided against and punished by the act, a sum not exceeding 5*l.*, nor less than 10*s.*, at the discretion of the justice or justices having jurisdiction therein (*b*).

Surveyor of the turnpike.

Of the surveyor of the turnpike-road, his appointment, liabilities, and duties, we have spoken in a recent page; and in the chapter on the repair of roads, this officer was mentioned as having powers and authorities for the maintenance of the road. We have also been made acquainted, that the surveyor and clerk must not be the same person. For the better enforcing of the turnpike acts, however, the surveyor has an especial duty to perform regarding weighing machines; for he must make convenient places for turning waggons, &c., upon every road where a weighing machine is erected, within 300 yards of such toll-gate, on each side thereof, if the ground will admit of it. If the driver of any such waggon, &c., being requested to return with his carriage to the engine, shall neglect or refuse so to do, he shall incur a forfeiture not exceeding 5*l.*; and any peace officer or other person being present, may, after such neglect and refusal, drive and take back the carriage in order to be weighed (*c*). The surveyor is not personally answerable to the labourers, they must look to the commissioners, or the treasurer (*d*).

(*a*) 13 G. 3. c. 78. s. 4.
(*b*) Id. s. 51.
(*c*) 3 G. 4. c. 126. s. 24.
(*d*) 1 Sir Wm. Bl. 670, Peckin v. Pawley. But commissioners under an act for paving the streets of St. Alban's, were held liable in the first instance, although

Accounts of surveyor.

The accounts of the turnpike surveyor have been already mentioned; those of the surveyor of highways are examined into with great strictness, as we shall proceed to shew.

Monies.

The surveyor of highways must collect the several assessments, forfeitures, penalties, sums of money, and compositions, within the year for which he is appointed surveyor, and must fairly enter a true account of such money as shall come to his hands, or those of his assistant, in a book kept for the purpose. The book must shew to whom, and on what occasion he has paid the same, and there must also be a list of all debts due in respect of the payments, compositions, &c., to be collected. There must also be an account of all tools, materials, implements, and other things provided by order of the inhabitants at a vestry or other public meeting for the repair of the highways, at the public expence of such parish, &c. The surveyor must produce these books, and the assessments made within the year, to the inhabitants of the parish, &c., at a vestry or other public meeting held for the purpose, within fifteen days before the Michaelmas special sessions, so that the account, assessments, and lists, may be inspected by the inhabitants. The books, &c. having been produced, the surveyor shall take them to some justice of the limit where the parish, &c. may be, and shall verify his account, upon oath, if required, some day after the above-mentioned meeting, but before the sessions; the day and hour to be fixed by the inhabitants at their meeting as aforesaid. If the justice find the account correct, he may allow it, or if he find cause, he may postpone it till the sessions, and then it may be allowed at the sessions, after the parts objected to by the justice shall have been verified and explained by proper evidence, to the satisfaction of the justices at sessions. But in case any article contained in the accounts shall not be proved to the satisfaction of the magistrates, they may disallow the same. The accounts being settled, and allowed or disallowed, the books and assessments shall be transmitted to the churchwarden, or overseer, or some principal inhabitant if the place be extra-parochial, to be kept for the use of the parish, &c. (*a*)

Tools.

Books produced.

Surveyor to verify his accounts.

Disallowance.

Surveyor to deliver duplicate of books, &c. to succeeding surveyor.

Moreover, the surveyor must give a duplicate of each book and account, together with all sums of money remaining in his hands, and all tools, materials, &c., to the succeeding surveyor; or if no new surveyor be appointed, and he be continued surveyor, then he must retain and account for them in his next account. The succeeding surveyor is required to recover and collect all debts, with as full powers on the subject as his predecessor had (*b*).

it was said, that they might recompense themselves out of the treasurer's funds in matters relating to their public capacity. 8 East, 41, Rex v. Kingston. And see Hardr. 205, Meriel v. Wymonsold.

(*a*) 13 G. 3. c. 78. s. 18.

(*b*) Ibid.

Penalty on surveyor making default.

If, however, the surveyor should neglect to provide the books, or to enter the accounts and lists, or to deliver the books, together with the duplicate, and the assessments, tools, &c. in manner aforesaid, he incurs a penalty not exceeding 5*l.* nor less than 40*s.* And should he make default in paying or accounting for money remaining in his hands within the time and according to the directions above mentioned, he incurs a forfeiture of double the value of such residue as the justice shall adjudge to be in his hands (*a*).

On death of surveyor, his executors to account.

Should the surveyor die before such accounts and lists are made out, or the requisites of the act are complied with, the executors must perform the duty of their testator in the same manner, and under the same penalty (*b*).

Fees to justices' clerk.

The fee to the clerk of the magistrates for the printed abstract has been already mentioned. This section awards to the clerk,

	s.	*d.*
For the appointment and charge	1	0*
For the bond	0	6
For the oath to be administered on verifying accounts	1	0

And if any person shall receive a greater fee he shall forfeit 10*l.* (*c*).

It is indispensable, that these accounts should be verified before a justice, for the special sessions have no *original* jurisdiction. Where, therefore, instead of carrying his accounts to the nearest magistrate, as he was directed by a resolution of the vestry, the surveyor went before the special sessions, where they were allowed, the Court of King's Bench quashed the order of petty sessions for this allowance, for the reference ordained by the act is merely upon those parts of the account which are not allowed by the single justice; the allowance, consequently, was not in pursuance of the act (*d*). Notwithstanding this decision, it was contended in a subsequent case, that the exhibiting accounts before one justice was merely a matter of form. A surveyor attended with his accounts, but neglected to bring the assessments, upon which the magistrates, considering that he could not investigate the accounts without the assessments, desired the surveyor to attend with all the necessary documents at the petty sessions †. There

(*a*) 13 G. 3. c. 78. s. 48.

(*b*) Ibid.

* That is, besides the sum of 1*s.* for the printed abstracts.

(*c*) 13 G. 3. c. 78. s. 48. Surveyors, appointed under the old act of 7 G. 3, were also directed to account, but no appointment of a surveyor was to be made under such old act. It was repealed by the statute before us. 13 G. 3. c. 78. s. 84.

(*d*) 5 B. & C. 816, Rex v. Somersetshire Justices. 8 D. & R. 733, S. C.

† "Consent cannot give jurisdiction to a court that has none." 2 Burr. 746,

the accounts were allowed, but the order was quashed upon moving it into the King's Bench by *certiorari*, the statute not having been complied with, which requires that the accounts shall be exhibited before one justice in such a manner as to enable him to exercise his judgment upon them (*a*). When we come to speak of appeals in a future part of this chapter, we shall find, that the judgments of the justice, and of the petty sessions are conclusive, and that no original application can be made to the quarter sessions upon that subject *.

4. Treasurers and clerks of turnpike trusts.

We have little to say concerning the treasurers and clerks of turnpike trusts, besides that which has been stated already in different parts of the chapter. Although, for the sake of brevity, they are classed together in this place, their respective offices may not unite in the same person, as we have seen, under severe penalties. The *treasurer* of a turnpike trust, however, must give security. The trustees are *required* to take sufficient security from every treasurer whom they appoint for the due and faithful execution of his office; it is at their discretion to take such security from any other officer (*b*).

5. Collectors of tolls.

Death, &c. of collector.

The surveyor is the collector of rates for the maintenance of highways, the officer who takes the toll on turnpike roads is called the collector, and is invested with various powers to enforce the execution of his duty. These collectors are appointed by the trustees, as we have seen, and upon the death, incapacity, refusal, neglect, or absconding of any one of them, any two trustees, &c. though not assembled at any meeting, may, by writing under their hands, appoint a person to continue until the next meeting of trustees, &c. Such newly appointed collector is to have the same powers as his predecessor, and to be answerable like him in all respects. Should any collector, who has been

by Foster, J. So that, before the highway act, where the *quarter sessions* had exercised a jurisdiction over the surveyor's accounts, the Court of King's Bench quashed their order. 2 Burr. 745, Rex v. Hartshorn.

(*a*) 6 B. & C. 152, Rex v. North Riding of Yorkshire Justices.

* Post. For the punishment of persons assaulting *surveyors* in the execution of their duty, see post, p. 154.

(*b*) 3 G. 4. c. 126. s. 76. A banker is in the nature of a treasurer. Where it was enacted, that if any treasurer, collector, officer, or other person appointed by the commissioners of a local paving act should become bankrupt before he might have satisfied all the monies received by him for or an account of the commissioners, the assignees should pay in full all the money due, in preference to all debts, except those of the crown: it was held, that bankers were within the words "other person," as being in the nature of treasurers, and that as the statute did not require their appointment to be in writing, the employment was equivalent to an appointment. 5 B. & C. 611, Frost v Bolland. Where also the same bankers had sold certain exchequer bills, the assignees were equally held answerable in full, for the words of the act included all monies received for or on account of the commissioners, and were not limited to monies received by virtue of rates and assessments. 5 B. &. C. 622, Dougan v. Bolland.

discharged from his office, or the wife, widow, child, family, or representative of any collector deceased, or who has absconded, or who has neglected his duty, or has been discharged, or any other person, having possession of any toll-house, buildings, or weighing-machine, neglect or refuse to deliver up such possession for three days after demand made, and notice given in writing for that purpose by any two or more trustees, &c., or their clerk or treasurer; any justice of the county, &c. where such toll-house may be, may, by warrant under hand and seal, order any constable or peace officer for the same county, &c. to enter such house, &c. with such assistance as may be necessary, in the day-time, and remove the person found therein, together with the goods, and to put the trustees, &c. or their officers, in possession (*a*).

Refusal to give up possession of toll-house.

Should any collector, or other person acting as such, incur a penalty, and then abscond, any justice, before whom the party may have been convicted, if the collector abscond after conviction, may order and adjudge that the penalty shall be paid by the lessee or farmer of the tolls under whom the collector acts, and the forfeiture shall be levied on the lessee, and applied like other penalties. If the collector have absconded prior to conviction, any justice acting for the county may make a similar adjudication upon an examination of the circumstances, and upon ascertaining from witnesses that the offence has been committed (*b*).

Collector absconding.

Every toll collector must put up his name on some conspicuous part of the front of his toll-house, i. e. his christian and surnames, painted in black on a board with a white ground, each letter to be two inches in length, and of a breadth in proportion. Such board is to remain there during all the time of the collector's duty at such toll-house. A neglect respecting the board as aforesaid is punishable by a forfeiture of 5*l.* (*c*)

Collector must put up his name.

The following offences by collectors are also liable to the same penalty. Demanding and taking a greater or less toll than is just from any person, or any toll from one exempted from payment of toll, and who shall claim such exemption. Refusing to permit any person to read or hindering him from reading the inscription on the board. Refusing to tell his christian and surname to any person demanding the same on being paid the toll, or giving a false name in answer to such a demand. Refusing or omitting to give a ticket denoting the payment of the toll, and specifying the toll-gate where it has been delivered, together with the toll-gates (if any) freed by such payment. Unnecessarily detaining or wilfully obstructing any passenger

Offences by collectors, how punished.

(*a*) 4 G. 4. c. 95. s. 49.
(*b*) 3 G. 4. c. 126. s. 54.
(*c*) 4 G. 4. c. 95. s. 30.

from passing through his gate, the legal toll being paid or tendered. Making use of any scurrilous language to any trustee, &c., traveller, or passenger (*a*).

When not punishable by indictment.

It is expressly declared, however, that the proceeding against a collector for asking and taking an illegal toll shall be by prosecution before a justice, and not by an indictment for extortion, or by any other course whatever (*b*).

Tolls how to be collected.

The trustees of any turnpike road, or the collector of tolls under any local act may demand and take every day (such day for the purposes of all local turnpike acts being computed from twelve o'clock at night to twelve o'clock of the next succeeding night) the tolls mentioned in any such act, at the respective toll-gates, turnpikes, side-bars, and chains, *in, upon, across, or on the sides of any turnpike road.* Such tolls are to be demanded and taken before any horses, cattle, or carriage can be permitted to pass through. The tolls so levied are vested in the trustees of the local act for the purposes thereby directed (*c*).

Collectors how to enforce payment of tolls.

The collector has power to distrain any thing upon which the toll is imposed in case of a refusal to pay. On a demand being made, if the party applied to neglect or refuse to pay, the collector may, alone, or with assistance, if he shall think it necessary, seize and distrain any horse, beast, cattle, carriage, or other thing, in respect of which toll is imposed, together with their bridles, saddles, gears, harness, or accoutrements, (except the bridled reins of any horse or beast separate from the horse or beast,) or any carriage in respect of the horses or cattle drawing the carriage on which the toll is imposed, or any of the goods or chattels of the person so refusing to pay. Then, if the toll, together with the reasonable charges of the seizure and distress, shall not be paid within four days next afterwards, the person distraining may sell the horse, &c., or a sufficient part thereof, returning the overplus (if any) and what may remain unsold, to the owner, upon demand, such tolls and charges being first deducted from the money produced by the sale (*d*).

Collectors to have carriages weighed.

Collectors are compelled to attend to the weighing of carriages. For the keeper of every toll-gate or bar, where there is any weighing engine, or other person appointed by the trustees, &c., or by their lessee to the care of such engine, is required to weigh all waggons, carts, and carriages liable to be weighed, which shall pass loaded through such gates or bars, and which he shall believe to carry greater weights than are allowed to pass without payment of an additional toll. If any collector, &c. shall permit

(*a*) 4 G. 4. c. 95. s. 30.
(*b*) Id. s. 50.
(*c*) 9 G. 4. c. 77. s. 16.
(*d*) 3 G. 4. c. 126. s. 39.

any such waggon, &c. to pass with greater weights than are allowed, without weighing and receiving the additional toll, he shall forfeit 5*l.* for every offence; and if the owner or driver of any waggon, &c. refuse to allow the weighing, or resist any gatekeeper or collector in so doing, he shall forfeit a sum not exceeding 5*l.* (*a*)

Trustees, &c. may have carriages weighed.

And in order to detect any fraudulent contrivance or neglect of duty in collectors, any trustee, &c. or surveyor of a turnpike-road, may, if he suspect connivance or neglect, cause any waggon, &c. which shall have passed through any toll-gate where an engine is erected, and shall not have gone more than 300 yards beyond the gate, to return to the engine, and to be there weighed with the loading which passed through the gate in the presence of such trustee, &c. This may be done on requiring the driver to drive his carriage back to the engine, and on paying or tendering 1*s.* to him, which shilling shall be returned to the person paying it, if upon weighing the carriage and loading, the weight shall be found to exceed the allowance (*b*). And further, if any collector, &c. shall suffer any waggon, &c. to pass upon any road within his view and knowledge, or to pass with wheels of a less breadth or a different construction *, without such names and description painted thereon as the act directs, and shall not, within one week proceed for the recovery of the forfeiture, &c., or shall allow any coach, &c., or any passenger to pass through any toll-gate, without paying toll, or shall be guilty of any other misconduct, he shall forfeit, on conviction before one justice, a sum not exceeding 5*l.* for each offence, at the discretion of the justice (*c*).

These officers are protected in the proper exercise of their duty. For if any person shall resist or make forcible opposition against any person employed in the execution of any turnpike act, or shall assault any surveyor, or any *collector*, or shall pass through any turnpike gate, rail, chain, or other fence set up by authority of parliament, without paying the due toll †, or shall hinder or make any rescue of cattle or other goods distrained by virtue of the act, such offender shall forfeit a sum not

(*a*) 3 G. 4. c. 126. s. 22. And see s. 11, post, in this chapter; and post, in this chapter, for the penalty which they incur for not attending to the *lamps*.

(*b*) 3 G. 4. c. 126. s. 23.

* The words "or drawn with a greater number of horses than by the act allowed," stood in this place originally, but were repealed by 4 G. 4. c. 96. s. 27.

(*c*) 3 G. 4. c. 126. s. 52.

† It is no defence, upon appeal to the sessions, to say that the gate has been unlawfully erected. The rejection of evidence to that effect is exclusively a question for the determination of the sessions, and a mandamus was consequently refused. The court also declined to interfere with the conduct of the trustees in having erected the gate, after a lapse of twenty-six years, for there were other remedies open to the party aggrieved than by mandamus, as indictment or trespass, which latter, the court observed, would be the more adequate and proper mode of redress. 1 D. & R. 325, Rex v. Cambridgeshire Justices.

exceeding 10*l.* at the discretion of the justice before whom he shall be convicted (*a*).

No collector, or person renting the tolls, or residing in the toll-house, nor any apprentice or servant of such collector, &c., shall *thereby* gain a settlement (*b*). This clause, it should be noticed, does not preclude a toll-keeper from gaining a settlement at all events, if he rent a tenement, for example, and comply with the provisions of the legislature regarding that mode of settlement, his right to remain in the parish will not be affected by the turnpike act. And it was thus decided under the old turnpike act, where the servant of a collector resided in a turnpike-house, but rented a tenement of more than 10*l.* per annum in the parish (*c*). Toll-keeper not to gain a settlement.

So again, under the old act, which was similar in this respect to the present, it was determined, that the renting of bridge-tolls was not within the prohibition, the bridge in question being no part of the turnpike-road (*d*). But where a person rented the tolls arising from certain gates near the city of Durham, and resided in a turnpike-house erected by order of commissioners appointed under an act for paving the streets of that city, he was held incapable of acquiring a settlement, although the words "turnpike road" did not appear in the local act; for, by the Court, the one is a stone road, and the other a gravel road, and every character belonging to a turnpike road belongs as well to this (*e*).

A subsequent statute enacts, that no collector or receiver of tolls for overweight, residing in any house or building erected or used by the trustees, &c., for the residence or accommodation of persons appointed for weighing, nor any apprentice or servant of such collector, &c., shall *thereby* gain a settlement (*f*).

II. *Of Tolls.*

The mention of collectors naturally leads us to the subject of tolls. The first thing to be done, is for the trustees or commissioners of the turnpike-road to farm out or let the tolls. This must be done at a public meeting, where the trustees are to let the gates on their respective roads. Notice must be given of the time and place of letting, at least one month before the day, by affixing it on every toll-gate on the road, and also by inserting it Notice of meeting to let tolls.

(*a*) 3 G. 4. c. 126. s. 139.
(*b*) Id. s. 51. 54 G. 3. c. 170. s. 5.
(*c*) 5 East, 333, Rex v. Denbigh Inhabitants.
(*d*) 1 M. & S. 514, Rex v. Bubwith Inhabitants. 3 M. & S. 249, S. P. per Lord Ellenborough, C. J.
(*e*) 11 East, 93, Rex v. Elvet Inhabitants.
(*f*) 4 G. 4. c. 95. s. 31.

in some newspaper circulated in that part of the country. The sum which the tolls produced in the preceding year must be specified in the notice, clear of the salary, (if any hired collector were appointed;) and it must state, that the trustees will let the tolls by auction to the best bidder, on his producing sufficient sureties for payment of the money monthly or otherwise, (as in such notice shall be specified,) and that they will be put up at the sum which they were let for, or produced in the preceding year, clear of the collector's salary (*a*).

Tolls to be put up at the last year's produce.

Mode of bidding.

To prevent any fraud or undue preference, the trustees, &c., must provide a glass with so much sand in it as will run from one end of it to the other in one minute, which shall be placed on the table, and shall be turned immediately after each bidding; and so soon as the sand shall have run out, the glass shall be turned again, and so for three times, unless some other bidding intervene, and if no other person shall bid until the sand have run through the glass three times, the last bidder shall be the farmer or renter, and shall forthwith enter into a proper agreement * for letting the tolls, and paying the money specified in the notice with such surety, and under such conditions, &c., as the trustees, &c., may think fit. In default of entering into the agreement forthwith, the tolls may be put up again immediately, and so continued until a bidder is found who will enter into the agreement. If there be no bidder, and the tolls should not be let at the auction, the trustees, &c., may accept a private tender, and let the tolls for any sum not being less than that at which they were leased the last time. Or the trustees, &c., may appoint a collector, or fix some future day for the letting, notice being first given as above, and they may put the tolls up in that case *at such sum as they shall think fit* (*b*).

Private tender, if not sold by auction.

Tolls at future auction to be put up at any sum.

Penalty on farmer, &c.

Any person, whether farmer, renter, or collector, who shall take a greater or less toll than is authorized by the act under which he collects, shall forfeit 5*l.* for every offence, and if the trustees, &c., think fit, the agreement shall be vacated, and made null and void (*c*).

Trustees may bid.

Tolls not to be let for more than three years.

The trustees are entitled to bid for the tolls so to be let, either by themselves, or their clerk or treasurer, or any other person authorized. But no tolls shall be demised or leased for a longer term than three years (*d*).

It is declared more specifically by a later act, that the trustees

(*a*) 3 G. 4. c. 126. s. 55.

* Signed by the trustees, &c. or any two or more, or by their clerk or treasurer, and the lessee, or farmer, and his sureties. It need not be by deed, or under seal. 3 G. 4. c. 126. s. 57.

(*b*) Id. s. 55.

(*c*) Ibid.

(*d*) Ibid.

may appoint some person to bid on their account, to the intent that the tolls should not be let for less than their adequate value (*a*). Trustees may appoint some one to bid.

The tolls may be let in lots. They may be leased either in one lot, or by parcels and in several lots; and if the trustees, &c., think proper to adopt that method, they are empowered to put up each parcel at such sum as they may choose (*b*). Tolls may be let in lots, and then each lot may be put up at any sum.

It happens sometimes, that a toll-gate or bar belonging to the trustees, &c., of one road is placed so near to the gate or bar of another road as to be inconvenient to the respective trusts, and to the public, in such cases the trustees, &c., of any turnpike-road may rent the tolls of such other road adjoining to that under their care, by agreement at a public meeting holden for the purpose, and they may collect and receive the same, or reduce or discontinue them as they may see fit (*c*).

Having stated how the tolls are farmed, we come now to shew the legal mode of proceeding to collect them. The trustees, &c., are required to put up, and continue at every gate a table, painted in distinct and legible black letters, on a board with a white ground, containing at the top the name of the particular gate, and a list of the tolls payable there, and distinguishing the total amount of tolls payable under any particular act, and under the two acts of 3 G. IV. and 4 G. IV., and the different sorts of carriages for which they are to be paid, when there shall be any variation therein, together with a list of the several gates which are wholly or partially cleared by payment of toll at the gate where the table is affixed. The trustees, &c. are to provide tickets, denoting the payment of toll, on which the name of the gate at which such tickets are delivered must be specified, and also the names of the gates freed by the payment, one of which tickets shall be delivered gratis to the person paying the toll. On the production of such tickets at any gate therein mentioned as being cleared by the payment of toll at the gate where the ticket was delivered, the person producing the same shall pass through the gate or gates without paying any further or additional toll (*d*). Table of tolls.

Of collectors we have already spoken, and it has been seen, that the trustees may, if they think proper, appoint persons to collect their tolls, but it is also provided, that during such time Lessees may appoint persons to receive.

(*a*) 4 G. 4. c. 95. s. 53.
(*b*) Id. s. 52.
(*c*) Id. s. 54.
(*d*) Id. s. 28.; 3 G. 4. c. 126. s. 37. We have seen, that the *collector* is bound under a penalty to deliver these tickets. Ante, p. 152.

as the tolls are leased, the lessee, &c., or person appointed, by writing under the hand of the lessee, &c., may demand and take the tolls so leased, and use all such means for recovering them in case of non-payment or evasion as any collector appointed under the turnpike acts might use. Such lessee, &c., or person so demanding and taking the tolls is to be subject to the like penalties as such collector so appointed by the trustees, &c., as aforesaid (*a*).

Contractors discharged from their contracts by virtue of 3 G. 4. and 4 G. 4.

The two statutes referred to in the margin enable contractors for tolls or penalties in respect of overweight at the time of passing the act of 1822, and contractors for *tolls generally* at the passing of that of 1823, to give up their contracts respectively, upon giving notice by the 1st of September in each year (*b*). And the latter statute gives power to the trustees, &c., upon such occasion to make any new contract with such lessee, &c., or to make any compensation to such persons in respect of tolls payable on the road, or of the tolls or penalties for overweight; or to cause such tolls to be re-let on a day, and at a place appointed by them, of which re-letting a month's notice was declared to be necessary. Such re-letting to be for the best price, and not necessarily at the sum for which they were last let. No *other meeting* for such re-letting was required (*c*).

Tolls payable in respect of what carriages.

Previously to entering upon the important question as to the liability of different carriages to pay toll, it may be observed, that the trustees of every turnpike-road have power to compound for any term not exceeding one year with any person for tolls payable in respect of horses, cattle, or beasts, or carriages, passing through any of their gates, and collected and taken under the authority of the particular act in the execution of which the trustees, &c., making such composition shall act, or of the turnpike statutes 3 G. IV. or 4 G. IV. (*d*).

The scale of tolls varies according to the provisions of the local acts which are framed to meet the exigencies of the various roads which they regulate, but the legislature has made many general provisions both regarding the quantum of tolls, and the particular description of carriages chargeable, which it now becomes our duty to consider.

Carriages affixed to others.

With respect to carriages affixed, tied, or secured to others,

(*a*) 3 G. 4. c. 126. s. 58.

(*b*) 3 G. 4. c. 126. s. 17. 4 G. 4. c. 95. s. 8.

(*c*) 4 G. 4. c. 55. s. 9. The statute 3 G. 4. c. 126. s. 18, gave a like authority, but it was confined to the tolls or penalties in respect of *overweight*, whereas the later act included all tolls.

(*d*) 4 G. 4. c. 95. s. 13. The prohibition in the act of 3 G. 4, against taking a composition in respect of tolls for overweight is repealed by 4 G. 4. c. 95. s. 12.

the act directs, that if no toll be specified by any act to be taken for any coach, chariot, chaise, or other carriage with four wheels affixed, &c., to any waggon or cart, the same toll, and no more, shall be demanded, as if the same were drawn by two horses. So again, any chair, cart, or carriage, with two wheels only, and so affixed, &c., shall pay such a toll as though it had passed through the gate with one horse, provided, again, that no specific toll be directed by any act. Lastly, if any horse be fastened to any waggon, cart, or other carriage, not being used in drawing it, no higher toll shall be taken than as for a single horse. However, if any coach, chariot, chaise, chair, cart, or other carriage, so affixed, &c., shall have any goods conveyed therein besides the harness belonging, and such articles of package as may be necessary for the protection of such carriages, the same shall be liable to double the toll imposed as above (*a*).

Extra half tolls, &c.

After the 1st of January 1823, the trustees, &c., of any turnpike road were required to demand and take the following extra tolls:

For every waggon, wain, cart, or other such carriage, having the fellies of the wheels of less breadth than four inches and a half at the bottom or sides thereof, or for the horse or horses, or cattle drawing the same.....	One half more than the tolls payable for such a carriage with wheels of 6 inches in breadth.
For every waggon, &c., [as above] having the fellies, &c., of the breadth of four inches and a half, and less than six inches at the bottom or sides thereof, or for the horse, &c. (*b*)...	One fourth more than if such carriages had wheels of 6 inches in breadth.

Exceptions.

The rate for the width of wheels, as ordered by the old act of 13 G. III., was not acted upon universally. Provision was, therefore, made by the legislature upon a different scale from that given above, in respect of such roads as were not regulated according to that statute. Thus, where the trustees, &c., shall not, previous to the passing of the 3 G. IV. [the act of 1822] have taken and collected the additional tolls on waggons, &c., having the wheels of less breadth or guage than six inches, &c., as directed by 13 G. III. and where, under the particular or local act there shall not be any scale of tolls applicable to the road in question, such trustees, &c., after the 1st of January, 1824, shall continue to take,

(*a*) 3 G. 4. c. 126. s. 31.
(*b*) Id. s. 7.

For every waggon, wain, cart, or other such carriage, having the fellies, &c., of less breadth, &c., than four inches and a half, or for the horses, &c.....	The same tolls as are payable by the local act for such waggons, &c.
For every waggon, &c., having the fellies, &c., of the breadth of four inches and a half, and less than six inches at the bottom, &c.....	One sixth less than the tolls payable for the same.
And for every waggon, &c., having the fellies, &c., of the breadth of six inches or upwards, &c. (*a*).....	One third less than the toll payable for the same by virtue of any act.

The next section relates to cases where there is a scale of tolls under a local act. Where a higher or lower rate of tolls is to be collected on any waggon, wain, cart, or other such carriages, *regulated by the greater or lesser breadth* of the wheels, and where the additional tolls imposed in respect of the breadth of wheels, by 13 G. III., shall not have been collected or imposed, the trustees, &c., were empowered, after the 1st of January, 1824, to continue to collect the tolls directed under the local act, but they are prohibited from imposing the additional tolls (*b*).

Then comes a provision for reducing such of the above-mentioned tolls as were increased by the act of 1822. For in every case where the tolls should be in the trustees' hands, and collected on their account, the trustees were directed to reduce the tolls within 14 days after the passing of the act, *in case they had been increased by the act of* 1822. The amount of the toll to be fixed according to the provisions above stated. If the tolls were let to farm, in such a case, then the trustees, &c., might compound with the farmer or lessee for reducing the same, and fixing the amount according to the new scale, such provision to come into operation at the time of the reduction, and not to be postponed until 1 Jan. 1824 (*c*).

Exception in favour of particular wheels.

Cylindrical wheels are favoured, as they do less damage to the road. Any waggon or cart having the bottom of the wheels rolling on a flat surface, and the nails of the tires counter-sunk and being cylindrical, (that is to say) of the same diameter on

(*a*) 4 G. 4. c. 95. s. 5.
(*b*) Id. s. 6. So it had been determined in Ridge v. Garlick, 2 B. Moore, 481.
(*c*) 4 G. 4. c. 98. s. 7.

the inside next the carriage as on the outside, so that when such wheels shall be rolling on a flat or level surface, the whole breadth shall bear equally on such surface; and having, moreover, the opposite ends of the axle-trees, so far as the same shall be inserted into the naves of the wheels, horizontal, and in the continuance of one straight line, without forming any angle with each other, and each pair of wheels having, when resting on the ground, the lower parts at the same distance from each other as the upper parts;—may be charged with a reduced toll, so as it be not less than two-thirds of the full toll, under an order of the trustees, &c. at a general meeting, if they shall think fit so to order (*a*).

Wheels may be measured.

Any trustee, &c., or collector, or his deputy, or other person acting under the authority of the trustees, or of their lessee, may have the breadth and construction of every waggon, cart, or other such carriage measured and examined. Such measurement and examination to take place before the carriage is allowed to pass through the toll-gate, or bar, if required by the trustee, &c.

Penalty on persons resisting the measurement.

Should any owner or driver of such waggon, &c., turn or drive out of the road in order to avoid or evade such measurement, or refuse to allow it, or an examination of the construction of his carriage, or attempt to pass through any toll-gate or bar before the same shall have been done (if required); or should such owner, &c., in any way hinder or obstruct the trustee, &c., in making such measurement and examination, he shall forfeit a sum not exceeding 5*l.* for every such offence.

It shall not be lawful, moreover, for any waggon, &c., not permitted to be measured, to pass along the road; and if any collector, or his deputy, or other person appointed to collect the tolls, shall allow such carriage to pass before the above measurement, &c. shall have been complied with, (the same having been required,) the offender shall forfeit a sum not exceeding 5*l.* for every offence (*b*).

Exceptions to the rules as to the breadth of wheels, &c.

Nevertheless, the following carriages are declared to be excepted from this rule relating to the breadth of wheels, as well as from the regulations as to weight, and also to tolls payable in respect of the wheels and the weight of carriages—as chaises-marine, coaches, landaus, berlins, barouches, phaetons, sociables, chariots, calashes, hearses, breaks, chaises, curricles, gigs, chairs, or taxed carts, or any cart not drawn by more than one horse or two oxen (*c*).

Reduction of tolls.

Trustees may reduce tolls. Should no power, or effectual

(*a*) 3 G. 4. c. 126. s. 9. See ante, p. 32, as to the tires of wheels used on turnpike roads.

(*b*) 3 G. 4. c. 126. s. 11.

(*c*) 4 G. 4. c. 95. s. 19. See post, 173, n. (*b*).

power be given them under the act by which they are appointed, they are empowered, by virtue of this act, [3 G. IV.] to lessen and reduce, from time to time, all or any of the tolls granted by any turnpike act during such time as they may think proper. A meeting must be held for the purpose, and one calendar month's notice given in writing, to be affixed on all turnpike gates upon the road, and inserted in some public newspaper circulated in that part of the country (*a*).

Trustees may subsequently advance the tolls.

They may also, afterwards, at a meeting held as above, advance the tolls so lessened, as they may see occasion, provided such advance do not exceed the rate granted by the act of parliament under which the tolls are demanded (*b*).

Consent of creditors to reduction.

But where the whole money borrowed on the credit of the tolls shall not have been discharged, the reduction shall not take place without the consent of the person or persons entitled to five-sixths of the money remaining due upon such tolls (*c*).

Reduction or advance to be in proportion.

But the reduction of tolls must be proportionate, and so also must the advance. That is, as to waggons, carts, and other carriages, the breadth of whose wheels are regulated by the act, [of 1822] reference must be had to the proportion or scale of tolls payable on such waggons, &c. according to the breadth of the wheels. So that the trustees, &c. making the reduction or advance, shall reduce or advance the toll payable on waggons, &c. having the fellies of the breadth of six inches, and shall then take and demand double, or other proportions, (as the case may be,) of such reduced or advanced tolls on waggons, &c. having the fellies of a greater or less breadth than six inches. Any reduction or advance made in any other manner than the above to be null and void (*d*).

And the trustees, &c. of roads within ten miles of the cities of London and Westminster, and the borough of Southwark, are empowered to lower the *additional* tolls for overweight, directed to be taken by the act of 1822, as they may think proper. A meeting must, in this instance, be held previously for the purpose, of which fourteen days' notice shall be given, and the trustees may then take the reduced tolls agreed upon at such meeting (*e*).

A case has occurred on the above section which speaks of a proportionate reduction or advance. Trustees under a local act were authorized to take four descriptions of toll at their different gates. It was contended, that the trustees had a power to re-

(*a*) 3 G. 4. c. 126. s. 43.
(*b*) Ibid.
(*c*) Ibid.
(*d*) Id. s. 44.
(*e*) 4 G. 4. c. 95. s. 20.

duce the tolls at all *or any* of the gates; but the court said, that such a deduction could only be made at *all* the gates, and that the legislature never intended to concede to them the power of reducing or advancing the tolls at one gate, and not at another. A rule for a mandamus, therefore, commanding the trustees to call a meeting, for the purpose of establishing an uniform rate of tolls, was made absolute (*a*).

Additional tolls for overweight.

We have now shewn, that certain tolls are payable by virtue of the respective local acts which regulate the different roads, that certain tolls are also payable in respect of a greater or less breadth of wheels, and in the chapter on the user of ways, we have given a table of the *weights* which may be ordinarily carried upon roads at the usual charge. Should there be an excess of weight in the *loading* of the carriage, such carriage becomes liable to another charge, called, an *additional toll.*

The Scale is as follows:

	per hundred. *s.*	*d.*
For every hundred weight, [of 112 lbs. to the hundred weight *] which any waggon, cart, or other such carriage, together with the loading thereof, shall weigh over and above the allowed weight, for the first and second hundred of such overweight	0	3
Above two hundred, and not exceeding five	0	6
Above five, and not exceeding ten hundred	2	6
For every hundred exceeding ten	5	0

Such sums may be collected by the usual persons authorized, and may be levied and recovered like other tolls or duties payable on the road on which any such weighing engine shall be erected, and the monies are to be applied to the repairs of the road (*b*).

Additional tolls for watering roads.

There are also additional tolls on some roads for watering them during certain months. The time for watering under such acts having been found too limited, the trustees, &c. are permitted, by a new enactment, to water roads between the 1st of March and the 1st of November, and to take the additional toll during that interval. The trustees are to have the same remedies for recovering the last-mentioned tolls, as in the case of other tolls (*c*).

(*a*) 4 B. & C. 361, Rex v. Bury and Stratton Roads' Trustees.
* The words of the act.
(*b*) 3 G. 4. c. 126. s. 15. See under the old acts, Cowp. 365, Chamberlin v. Songhurst.
(*c*) 3 G. 4. c. 126. s. 120.

Tolls generally not rateable.

Tolls taken on turnpike roads, whether according to the ordinary scale, or for overweight, are not rateable. Nor are toll-houses. The words of the act are very explicit, that no tolls, nor toll-house, nor any person in respect of such tolls, or toll-house, nor any tolls or penalties for overweight, nor any person in respect thereof, shall be rated or assessed towards the payment of any poor's rates, or any public or parochial levy whatsoever (*a*).

Penalties for evading toll.

The penalties for obstructing the weighing of carriages have been already mentioned (*b*); it remains only to notice the punishment which is inflicted upon such as evade the common toll. Thus, if any person shall go off or pass from any turnpike road with any horses, cattle, beast, or carriage, through or over any adjoining land, not being a public highway, (such person not being the owner or occupier, or servant, or one of the family of the owner or occupier of such land,) with intent to evade the payment of toll; or if the owner or occupier of such land shall knowingly or willingly permit any person (except as aforesaid) to go over such land with any horses, &c. [as above] with a like intent; or if any person shall give or receive from any person other than the collector, or forge, counterfeit, or alter any note or ticket directed to be given with a like intent; or if any person shall fraudulently or forcibly pass through any gate with any horse, &c.; or leave upon the road, &c. any horse, &c. whereof the payment of toll may be avoided or lessened; or have any horse, or other beast or cattle taken off from any carriage, either before or after passing through; or having passed through, shall add or put any horse or other beast to any carriage, and draw so as to increase the number of horses, &c. drawing the carriage, after the same shall have passed through any toll-gate, whereby the payment of toll may be evaded; or shall do any other act to evade toll; such person shall forfeit for each offence a sum not exceeding 5*l*. (*c*)

Disputes concerning tolls to be settled by a justice.

If any dispute should arise about the amount of tolls due, or the charges of making, keeping, or selling any distress for non-payment of toll, the collector, or person distraining, may retain the distress or the money arising from the sale of it, until such amount and charges be ascertained by some justice for the county, &c. wherein the turnpike gate at which the disputed toll is payable, may be situate. The justice, upon application made to him, shall examine the matter on the oath of the parties or other witness, (the justice being hereby empowered to administer such oath,) and shall determine the amount of the toll due, and award such costs and charges to either party as may appear proper to

(*a*) 3 G. 4. c. 126. s. 51. 4 G. 4. c. 55. s. 31.
(*b*) Ante, pp. 148, 154.
(*c*) 3 G. 4. c. 126. s. 41.

him. Such costs and charges are to be recovered in case of non-payment by distress and sale of the goods of the defaulter by warrant under the hand and seal of the said justice, the overplus to be returned (if any) after deducting the costs of the distress and sale (*a*).

Of Exemptions from Toll.

We come now to a very important part of our subject, and one which embraces many disputed points; namely, the various exemptions from payment of toll which have been allowed by the legislature.

His majesty's horses, &c.

First, no toll is to be taken for any horses or carriages attending his Majesty or any of the royal family, or returning therefrom [or (under a more recent act) for any horses or carriages attending *or going to attend*, or returning from having attended his Majesty or any of the royal family (*b*).] Nor in respect of carrying or conveying, or going empty to fetch, carry, or convey, or returning empty from carrying any stones, bricks, timber, wood, gravel, or other materials for the repair of a turnpike road or public highway, or for building, rebuilding, or repairing any present or future bridge * on any such road or highway, provided, that the horses or carriages, &c. so exempted have been employed upon that work only on the same day; nor from the surveyor of any turnpike when engaged in executing, or proceeding to execute within the limits of his own trust † the powers of any act relating to his road. Nor in respect of the carrying or conveying ‡ any dung, soil, compost, or manure § [save and except lime] || for improving lands, or any ploughs, harrows, or im-

Materials for roads and bridges.

No toll from surveyor.

Manure.

(*a*) 3 G. 4. c. 126. s. 40.

(*b*) 4 G. 4. c. 95. s. 24.

* It had been decided, that bridges were not highways within the meaning of 13 G. 3, (the old act,) which exempted carriages carrying materials for the repair of roads. 2 B. & A. 49, Osmond v. Widdicombe.

† The words "or any adjoining trust," stood here originally, but they were repealed by 4 G. 4. c. 95. s. 25.

‡ As to going empty for that purpose, see post, p. 169.

§ But if, by any local act, dung, compost, or manure be made specially subject to toll throughout the whole of the particular roads which it regulates, without any local, parochial, or partial exemption, the exemption given by the act of 1822, mentioned in the text, shall not be available. 4 G. 4. c. 95. s. 23. See further provisions on the subject of exempting *manure*, and *materials*, together with the *implements for unloading them*, from toll, post. p. 169, *et seq.*

|| But lime is now expressly exempted. For it had been determined under an old act, 31 G. 2, that lime was not exempt (*a*), and by a recent determination,

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(*a*) Anon. Lofft. 324.

plements of husbandry, (unless laden also with some other thing not hereby exempted from toll,) or any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land in the occupation of the owner of any such hay, &c., potatoes, or other agricultural produce, and which has not been bought, sold, or disposed of, nor is going to be sold; the horses, &c. so exempted having been employed only as aforesaid on the same day. Nor for any horses or other beasts employed in husbandry going to or returning from plough or harrow, or to or from pasture or watering-place, or going to be or returning from being shoed or farried; such horses, &c. not going or returning on these occasions more than two miles on the turnpike road on which the exemption shall be claimed. Nor from any person going to, or returning from his parochial church or chapel, or usual place of religious worship tolerated by law, on Sundays, or on any day on which divine service is by authority ordered to be celebrated *. Nor from any inhabitant of any parish, township, or place, going to or attending the funeral of any person who shall die and be buried in the parish, township, or hamlet in which any turnpike-road shall lie. Nor from any rector, vicar, or curate going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish. Nor in respect of carrying or conveying any vagrant sent by a legal pass, or any prisoner sent by a legal warrant, or returning empty after having been so employed. Nor in respect of any horses or carriages of whatever description employed in conveying the mails of letters and expresses under the authority of the postmaster-general, either when employed in conveying, fetching, or guarding such mails

Agricultural produce.

Horses employed in husbandry.

Going to or returning from church.

Rector, &c. attending duty.

Vagrants and prisoners.

Mails.

the carriage of that article was held not to be exempt under the words "any thing whatsoever used in the manuring of land," in an act of parliament, those expressions being considered to apply only to the carriage of ploughs, harrows, and such instruments (*a*). Therefore, a provision was made, that no toll should be taken for lime for the improvement of land, *other* than under the authority of any local act previous to the passing of the 3 G. 4. [the act of 1822.] (*b*).

And, moreover, it was declared, that in all cases where any lease or contract should have been made since the passing of the 3 G. 4, by any trustees to or with any collector of tolls, for letting to farm any tolls on a road, whereon a toll on lime for improving land was payable, or considered so to be under that act at the time of making such lease, &c. the trustees might make such abatement in the rent during the unexpired residue of the lease, &c. as should be agreed on between them and such collectors as aforesaid. Or, such lease, &c. might at the end of one calendar month, after the passing of this act, become absolutely void, upon payment, but not otherwise, of all rent and arrears of rent, or sums of money due up to the end of such calendar month, to be paid by the collector, his heirs, executors, or administrators (*c*).

* This exemption is declared by a subsequent section not to extend to any turnpike gate within five miles from the Royal Exchange, or within five miles of Westminster Hall. 3 G. 4. c. 126. s. 33.

(*a*) 2 Chit. Rep. 655, King v. Gough.
(*b*) 4 G. 4. c. 16. s. 1.
(*c*) Id. s. 2.

or expresses, or in returning back from so doing. Nor in respect of any officers' or soldiers' horses on their march or on duty, or in respect of horses, carts, &c. employed in carrying and conveying, or returning empty from carrying, &c. the arms and baggage of such officers and soldiers, or any sick, wounded, or disabled officers or soldiers, such horses, &c. having been employed only in so doing. Nor in respect of any waggon, wain, cart, or other carriage whatsoever, or the horses, &c. drawing them, employed in conveying any ordnance, or barrack, or commissariat, or other public stores belonging to the king, or for the use of his majesty's forces, or returning empty from such work. Nor for any horse furnished by or for any person belonging to any corps of yeomanry, or volunteer cavalry or infantry, and rode by him in going to or returning from any place appointed for and on the days of exercise, inspection, or review, or on other public duty, provided that such person shall be dressed in the uniform of his corps, and shall have his arms, furniture, and accoutrements according to the regulations of such corps at the time of his claiming of the exemption. Nor for any horses or carriages carrying any one to or from the election of a member for the county where the turnpike road shall be situate. Nor, lastly, for any horses or carriages which shall only cross any turnpike road, or shall not pass above 100 yards thereon (*a*).

Horses of officers, &c. on duty.

Baggage, sick officers, &c.

Ordnance or public stores.

Yeomanry horses, &c.

County elections.

Some cases have been decided upon the subjects mentioned in the foregoing section which deserve our attention. There was an exemption in a local turnpike act, of cattle going to or returning from pasture, and another, of horses attending cattle returning from pasture. The plaintiff's servant rode a horse for the purpose of fetching the cows from pasture, and toll was demanded of him, which being refused, the horse was distrained. Lord Kenyon said, that if this were allowed to be an exemption, it would open a great door to fraud on the turnpike men, for they have no means of knowing whether a horse be going to fetch cattle, and the plaintiff was holden neither to be within the words nor the spirit of either exception (*b*).

Horses returning from pasture.

Toll was taken from the plaintiff, a dissenter, when going to a meeting at Devizes on Sunday, and the jury found that such meeting was his proper place of religious worship. The court held, that the words "chapel or other place of religious worship", were to be understood of places of the same kind as church, and that the word, "parochial", should be taken to ex-

Proper parochial church, &c.

(*a*) 3 G. 4. c. 126. s. 32. Nothing in the above act shall extend to repeal or take away any exemptions granted or allowed by any local acts. 4 G. 4. c. 95. s. 26.

(*b*) 6 Term Rep. 706, Harrison v. Brough.

tend over the whole clause. Judgment was given, therefore, for the defendant, the collector of tolls (*a*).

Horses, &c. which shall only *cross any turnpike road*, or *shall not pass above one hundred yards thereon.*

The exemption mentioned in the margin means a very slight user of the road. The carts of the defendant entered the road, passed through a gate, and continued on the road until they came to a lane turning off on the *same side* of the road on which they entered it, and leading to the defendant's lime kilns. They did not cross the road. Pell, sergeant, said, that the exemption would not avail, because the carriage did not actually cross the road; but the court made the rule absolute for a nonsuit against the farmer of tolls, for a carriage could not go 100 *yards* in merely crossing, and, therefore, might clearly pass along the road within the distance limited, although it should not cross (*b*).

Some litigation having arisen as to the liability of carts conveying manure when going to or returning from a parish or place where the turnpike road in question did not extend, it was declared, that whenever in any act of this kind there should be any exemption in respect of any horse, mule, ass, ox, waggon, cart, &c. drawing, &c. any dung, mould, marl, or compost whatsoever, for improving or manuring land, or hay, straw, or other fodder for cattle, or materials for repairing any turnpike road or highway, the exemption should be deemed to extend to such horse, &c., and also to any carriage going empty or loaded only with implements necessary for more convenient carriage, or loading or unloading the lading, or returning empty, or with such implements after having been so laden, notwithstanding the going into and returning from a strange parish, as we have above stated (*c*). In a local act, there was a full exemption as to manure and implements, but a subsequent clause empowered trustees to compound with persons who resided in one, and occupied lands in another parish. Upon this, it was contended, that the plaintiff's waggon laden with lime [lime was specially exempted] was liable to pay toll, the latter section having limited and restrained the exemption. But the court said, that the first clause being general, could only be restrained by express words, or necessary implication, and that the plaintiff would be liable to other tolls not falling within the general clause of exemption; that the power to compound for all or any tolls, must mean all or any of such a description, as were payable generally, and not those from which all persons were exempted before; and that, sup-

(*a*) 2 B. & A. 206, Lewis v. Hammond.

(*b*) 5 Taunt. 341, Major v. Oxenham. The words in the old act were, "no person shall be liable to pay, &c. or to be subject to any penalty for any carriage, &c." But it was held, that this provision was confined to *carriages*. 2 Chit. Rep. 412, Phillips v. Harper. The present act includes *horses*.

(*c*) 3 G. 4. c. 126. s. 26.

posing the clause were doubtful, the provision, being for the public benefit, ought to be largely and beneficially construed (*a*).

But it is obvious, that frauds might be committed on toll-collectors if too great a latitude were admitted in allowing empty carriages to pass free. There is, therefore, a provision to the following effect. The owner or driver of every empty waggon, &c. and claiming exemptions in respect of manure, materials, or implements to be conveyed therein, shall in all cases pay the toll; but the collector shall deliver to such person a ticket to be marked, "manure exemption", or "road materials", (as the case may be,) with the name of the gate and the date when delivered, and the amount of the toll paid, and then, upon the return of the waggon, &c. laden, and on the production of the ticket, the money shall be returned to the owner or driver. Any collector refusing to give such a ticket on receiving the toll, or neglecting to return the toll on the return of the carriage and redelivery of the ticket, is to forfeit to the owner a penalty not to exceed 5*l.* on conviction before a justice of the county, &c. where the offence happens, upon the oath of a credible witness (*b*). Empty carriages.

Further, the owner or driver of any waggon, &c. laden with manure, or materials for any road, or highway, passing through any turnpike gate, or on or across any road, shall not pay toll, nor shall it be demanded in respect of any basket, empty sack, spade, shovel, or fork necessary for loading or unloading the manure or materials, although it be in addition to such manure or materials, provided the loading be substantially manure for land, or materials for the repair of the road or highway (*c*). Baskets, &c.

Again, all horses travelling for hire under the post-horse duties acts, having passed through any turnpike, drawing any carriage in respect of which any toll shall have been paid, shall be permitted to repass, toll free through that turnpike, and the other gates (if any) cleared by such payment, either without such carriage, or drawing such carriage, the same being empty, and without a ticket denoting a fresh hiring, although such horses or carriage shall not have passed through such gate on the same day, provided that such horses so travelling shall return before nine in the morning succeeding the day on which they first passed the gate where the toll has been paid (*d*). And if any horse or horses pass through a turnpike gate not drawing any carriage, Post horses, &c.

(*a*) 3 Moore, 185, Hickinbotham v. Perkins. 8 Taunt. 795, S. C.

(*b*) 3 G. 4. c. 126. s. 27. It had been decided, that carriages going *empty* to fetch manure were exempted. 2 Chit. Rep. 547, Harrison v. James. However, if the cart be laden with manure, the toll-keeper must let it pass free. 6 M. & S. 52, Rex v. Adams.

(*c*) 3 G. 4. c. 126. s. 28.

(*d*) Id. s. 29.

and a toll be thereupon paid, and the same horse, &c. return drawing any carriage on the same day, or within eight hours after first passing through the gate, the toll paid as above shall be deducted from that payable when drawing the carriage, so that no higher toll in the whole shall be taken than if such horse, &c. had in the first place passed through the gate with the carriage (*a*).

Several decisions have occurred upon local acts containing provisions similar to those we have just detailed. As a general rule, "all cases of this description depend upon the manner in which the act of parliament is worded." (*b*) The tolls are sometimes imposed upon *horses*, sometimes upon *carriages*, sometimes both are the objects of toll in local acts. "It is an established rule," said Mr. Justice Bayley in a very recent case, "that where the toll is imposed upon *carriages* drawn by horses, and there is a clause of exemption for all persons re-passing in the same day with the *same horses and carriage*, or *with the same horses or carriage*, and the same carriage returns the same day drawn by different horses, no second toll is payable. And where the toll is imposed upon the *horses* drawing the carriage, with a similar clause of exemption, no second toll is payable, if the same horses return with a different *carriage*." (*c*) Thus, where the toll was laid by a local act upon the *carriage* and *horse*, and the exemption was, that no one should pay twice for the same carriage *or* horse, the court held, that this exemption extended to protect the *same carriage* on the same day from a further payment of toll, though drawn by different horses (*d*). It was provided by a subsequent clause, that in all cases of *carriages travelling for hire*, the traveller or passenger should be considered to be the person paying the toll, and that the payment should not exempt such carriages repassing with a different traveller or passenger; and the court held, that this clause did not extend to stage-coaches, the *carriage* not being hired by passengers, but only a *conveyance* by it (*e*). So, where the toll was laid upon the *horses* with an exemption in favour of persons who had paid toll, it was held, that horses having passed through the turnpike were exempted on returning the same day, though with a *different carriage* (*f*). A former act, applying to the same turnpike, had laid the toll upon the *carriages*, but the old tolls were repealed, and the new laid upon the horses; with that exception, however, all the provisions of the old act were declared to be as fully continued as though they had been re-enacted. Here the new mode super-

(*a*) 3 G. 4. c. 126. s. 30.
(*b*) 2 B. & C. 518, per Bayley, J.
(*c*) 5 B. & C. 33.
(*d*) 10 East, 66, Williams v. Sangar.
(*e*) Ibid.
(*f*) 2 B. & B. 30, Gray v. Shilling.

seded the old, with all its consequences *. And thus it was, that where tolls were imposed upon *carriages,* with an exemption for all persons who had paid in respect of their carriages, and a subsequent act imposed an increase of tolls, but laid it on the *horses* instead of *carriages,* a stage-coach, belonging to the same proprietor, *different* from that which had passed through a toll-gate in the morning but drawn by *the same four horses,* was held exempt on re-passing through the same gate in the evening (*a*). So, again, where the toll was laid upon the *horses,* and the exempting clause declared, that if any person should have paid toll, the *same person* should be permitted to pass free with the same cattle *or* carriage, it was held, first, that the toll being laid upon the horses, a second toll could not be demanded for the same horses re-passing though drawing a *different* coach; and, secondly, that it was not necessary that the *same* hand should have paid the toll in returning, for though the coachman offers the money, it is the master who pays, and, consequently, that, although a *different coachman* drove the horses when returning, the case was not altered (*b*). So, where the toll was upon *horses,* and the proviso was, that no collector should take more than one toll in respect of the same *carriage, horses,* &c. such person producing a ticket denoting that such toll had been paid *in respect of such horse,* beast, or other cattle [*not mentioning carriage*], it was held, that a second toll was not payable on the same day in respect of the same horses, though drawing a *different carriage* belonging to the same proprietor (*c*). And in a similar case, where the toll was upon the *horses* for the most part, but there were two instances in which toll was laid upon *carriages,* the court maintained the same opinion. There was in this latter case a general clause of exemption applicable both to the *horses* and *carriage,* and the court, considering the matter doubtful, said, that they ought to incline to that construction which would have the effect of *relieving the subject from a burden.* The word "carriage", in the exempting clause, might have effect as applicable to those instances where the toll was imposed on *carriages* (*d*). But where the tolls were imposed on *every carriage drawn by horses,* together with tolls upon waggons, *and* tolls upon *horses* laden or unladen and not drawing, with a proviso, that there should be no second toll in respect of the same horses, beasts, *and* carriages, it was held, that, where the *same coach* passed through a toll-gate in the evening of the day on which toll had been paid, but with *different horses* and

* See the observations of Bayley, J. 5 B. & C. 30.

(*a*) 5 B. & C. 25, Fearnley v. Morley.

(*b*) 3 Bing. 41, Norris v. Poate. 10 Moore, 293, S. C.

(*c*) 5 B. & C. 31, Jackson v. Curwen. And there was, moreover, a clause which enabled trustees to compound with persons in respect of the tolls payable for such *horses, beasts, or other cattle* [*not mentioning carriages*].

(*d*) 5 B. & C. 36, n. Chambers v. Williams.

passengers, a second toll was payable (*a*). Had the word been "or", instead of "and", the case would have been governed by that of Williams v. Sangar *.

There is one other case upon the subject which has not been mentioned, that of Loaring v. Stone (*b*). The toll was upon the *horses*. The exemption was, that a second toll should not be payable in respect of the same *horses and carriages*, upon the production of a ticket denoting the payment of such toll, and there was a clause which made it lawful for the collector to seize and distrain any *horse, cattle, or beast*, upon which any toll was imposed by the act. The court held, that a second toll was payable in this case, since, as no toll was imposed by the enacting clause upon the carriage, there could be no reason for introducing that word into the proviso, unless it were intended to confine the exemption in respect of horses drawing carriages, to the same horses drawing the same carriage. It might be very reasonable, "that the exemption should be limited to that case, for otherwise the same horses, with a different hired chaise, and with different travellers, would be exempt from the payment of toll." (*c*)

It is, indeed, difficult to resist the suggestion of a learned author on the subject of highways, very recently published (*d*), that the cases of Loaring v. Stone and Jackson v. Curwen cannot be reconciled.

It is quite clear, that the Court of King's Bench considers the law to be, that where the toll is upon the *horses* only, such horses may repass under the exempting clause, though with a different carriage; that if the toll be upon the *carriages*, such carriages may so repass though with different *horses*, belonging to the same proprietor; that if the toll be on horses *or* carriages, with a similar clause of exemption, a similar effect will ensue; but that if the toll be on horses *and* carriages, the *same* horse *and* carriage must repass as above, in order to come within the exemption. The obscure wording of the acts of parliament has occasioned much perplexity to the learned judges. It was said in the very late case of Chambers v. Williams, that in Loaring v. Stone the word "carriage" must have been wholly rejected in the clause, unless a second toll were due (*e*). That difficulty, however, is in full force in the case of Jackson v. Curwen, for the clauses of exemption respectively are in substance the same. Considering the case of Jackson v. Curwen as having been very lately decided, and that Mr. Justice Bayley in that case reviewed the au-

(*a*) 4 B. & C. 200, Waterhouse v. Keen.

* By Bayley and Holroyd, Justices.

(*b*) 2 B. & C. 515, Loaring v. Stone.

(*c*) By Bayley, J. 2 B. & C. 519. The case of Jackson v. Curwen, before cited shows, that in the case of a stage-coach, such an exemption has been allowed.

(*d*) See Wellbeloved on Highways, p. 289, *et seq.*

(*e*) 5 B. & C. 38.

thorities on the subject, together with the principles upon which they were supported, without mentioning Loaring v. Stone, it may perhaps be observed, without presuming too far, that Loaring v. Stone is of very doubtful authority.

Exemptions from tolls for overweight.

There are exemptions from additional tolls for overweight as well as from tolls generally. Thus, these regulations as to overweight shall not extend to any waggons, carts, or other carriages, carrying only manure * or lime for the improvement of land, or any hay, straw, fodder, or corn unthreshed, except such hay &c. as is carried for sale; nor to any waggons, carts, or other carriages, carrying only one tree or one log of timber †, or one block of stone, or one cable or rope, nor to any chaise, &c. (*a*). Further, these latter exemptions extend to waggons, wains, carts, or other carriage, carrying only one block, plate, roll, or vessel of iron or other metal, or compounded of any two or more metals, cast, wrought, or united in one piece (*b*).

His Majesty's stores are also exempted. For no person owning or driving any waggon, &c., provided for the service of his Majesty's forces, or conveying any ordnance, or barrack, or commissariat, or other public stores of or belonging to his Majesty, or for the use of his Majesty's forces, shall be subject to any additional toll, penalty, or forfeiture, for overweight; nor shall any such waggon, &c., or the horses &c., be stopped or detained by reason of any weight in any such waggon, &c., or of being drawn by any number of horses or oxen; but the owner or driver may put any number of horses or oxen to such waggon, &c.; any thing relating in any act to highways or turnpike-roads notwithstanding (*c*).

However, an ordinary exemption from tolls will not extend to tolls for overweight, unless they also be specially exempted (*d*). And unless four and a half inch fellies or up-

* A waggon having delivered some goods at the plaintiff's house in town, took in a heavy load of dung to be carried back: an empty basket, and two empty bottles were tied to the fore part of the waggon with a hay rope. The defendant, a toll-collector, insisted on weighing the waggon in consequence of these bottles and basket, and distrained a horse. Trespass was brought. By Lord Ellenborough, "If the waggoner's frock were thrown over a waggon loaded with manure, would that render it liable to be weighed? If not, it is not every thing that is carried besides the manure which will subject the owner of the waggon to the additional duty." His lordship observed, that the statute [the old act of 13 G. 3, but the case applies as well to the present law] respected the conveyance of *goods and merchandise*, and asked if the empty basket and bottles could be deemed such. Verdict for the plaintiff. 2 Camp. 393, Chambers v. Eaves.

† Under the old acts this exemption was not available. 4 Burr. 2258, Stevens v. Duffty.

(*a*) 3 G. 4. c. 126. s. 16. See these latter exemptions of chaises, &c. more fully expressed in a section of the act of 1823, ante, p. 161.

(*b*) 4 G. 4. c. 95. s. 21. See similar exemptions in the highway act, ante, Ch. IV. on the User of Ways, p. 29.

(*c*) 3 G. 4. c. 126. s. 35.

(*d*) 4 G. 4. c. 95. s. 17.

wards be used, there will not be any exemption whatsoever, except of corn, hay, manure, or husbandry implements; for it is declared, that no person shall have this benefit either in respect of tolls, or penalties for overweight, or to pay less toll for or in respect of any waggon, wain, cart, or other carriage, or the horses, &c. drawing the same, and carrying any *particular* kind of goods, unless such waggon, &c. shall have four and a half inch fellies or upwards. Carts and carriages employed in carrying corn or grain in the straw, hay, straw, fodder, dung, or lime for the improvement of land, or other manure, or ploughs, harrows, or implements of husbandry, are excepted. With that saving, the usual tolls, and all additional tolls on the breadth of wheels, as well as additional tolls or penalties for overweight shall be taken in such cases (*a*).

Penalty on persons claiming exemptions without being entitled.

Should any person, by any fraudulent or collusive means, claim or take the benefit of any exemption from toll or overweight, or for using any additional horse, or any other exemption in the act, he shall forfeit a sum not exceeding 5*l.*; and in all cases the proof of exemption shall be upon the claimant (*b*). And a very recent statute imposes the like penalty on all persons claiming or taking the benefit of exemptions mentioned in any local turnpike act, without being entitled. The same provision is made as to the proof (*c*). It is very deserving of notice, that the ground of exemption should be specified to the toll-gate keeper. A carman carrying manure (which was in reality exempt) was stopped by the collector, who demanded toll; the carman asked what the demand was, and on being informed, paid it without claiming his exemption. It was held, that no indictment for extortion could be sustained against the collector, for in receiving the toll, he committed no offence for which he could be criminally answerable (*d*).

Mortgages of Tolls.

The next consideration on the subject of tolls is that of mortgage.

Trustees may borrow money.

The trustees, &c. are empowered to borrow and take up at interest on the credit of tolls any sums they may think fit, and to demise and mortgage the tolls, together with the turnpikes and toll-houses, (the costs and charges of mortgages to be paid out of the tolls,) as a security to the lenders, or their trustees*.

Copies of mortgages.

Copies of all such mortgages shall be entered in a book kept for the purpose, by the clerk or treasurer, for which entry the clerk shall have 5*s.*, and no more out of the tolls, such book to be pe-

(*a*) 4 G. 4. c. 95. s. 10.
(*b*) 3 G. 4. c. 126. s. 36.
(*c*) 9 G. 4. c. 77. s. 17.
(*d*) 4 Campb. 379, Rex v. Hamlyn.
* See the form of mortgage in the Appendix, post. Tit. MORTGAGE.

rused and inspected at all seasonable times, without fee or reward. These mortgages may be assigned. For all mortgagees of tolls, or persons from time to time entitled to the money secured may assign or transfer their rights, titles, and interests in and to the mortgages, and the principal money and interest thereby secured, to any other person*. Such assignment is to be indorsed on the mortgage security, or to be underwritten, or thereunto annexed, and signed in the presence of, and attested by, one or more credible witnesses. This transfer shall be produced and notified to the clerk or treasurer, within two calendar months after its date, who shall enter the same in the book aforesaid, with a fee of 5*s.*, and no more, for such clerk or treasurer. Such transfer shall then entitle the assignee, his executors, &c., to the full benefit of the security. Every such assignee may, in like manner, assign or transfer the same, and so *toties quoties*, and it shall not be in the power of any one (except the assignee or transferree, his executors, &c.) to release, discharge, or make void the original mortgage security, or the monies due; and all mortgagees, &c., shall, in proportion to the sums secured, be creditors on the tolls, toll-gates, and houses, in equal degree, one with another, or in such order as shall be agreed on and stipulated by the trustees, &c., at the time of the advance of their respective shares (*a*). Assignment of mortgages.

To guard against any inconveniences which might arise from the expiring or repeal of acts, it is provided by a recent statute, that all mortgages, bonds, &c., shall be valid, notwithstanding such repeal. To be more particular; at the expiration or repeal of any turnpike law, the term and tolls granted by any subsequent act shall be liable to the payment of (with the interest then due) any monies which have been borrowed under the old act, on the credit of the tolls. And debtors to the trustees of the former act are made equally liable to the trustees under new acts, and such trustees shall apply the monies so to be received to the purposes of such new acts (*b*). So again, all conveyances, bonds, covenants, agreements, contracts, and securities, made to or with the trustees of any local turnpike act, or by any other person on behalf of the trustees, according to the provisions of such act, shall remain in full force notwithstanding the expiration or repeal of the act, and shall be available in all courts, and before all judges and justices having jurisdiction, as the case may require, until the same be fully satisfied and performed, on account and for the benefit of the trust created under any new act (*c*).

* See the form of assignment in the Appendix, post. Tit. MORTGAGE.
(*a*) 3 G. 4. c. 126. s. 81.
(*b*) 9 G. 4. c. 77. s. 10.
(*c*) Id. s. 11.

Mortgages renewed.

Further, trustees under any local act may receive in and cancel any mortgage granted under the trusts of a former act for the same road, and, instead thereof, may give and execute another or other mortgages, at the expence of the parties requiring the same (*a*). And, moreover, where it shall appear by the books kept by the clerk or treasurer, or by any satisfactory evidence adduced at a meeting of trustees, that any person is a creditor on security of the tolls, but that the mortgage or assignment has been lost, mislaid, or by accident destroyed, the trustees, or any three or more, may execute an assignment of the tolls for the sum mentioned in the original assignment or transfer, at the expence of the party applying; every such assignment last mentioned to be valid and effectual for the purposes thereby intended (*b*).

Recovery of subscriptions.

The persons subscribing for or agreeing to advance money for the road, or highway intended to be made turnpike, are required to pay their subscriptions, within such time, and in such proportions, as shall be expressed in the writing subscribed by them, or on their behalf, or as the trustees shall direct. The subscriptions are to be demanded by, and paid to, such person as the trustees shall authorize under their hands to receive it. Should any person refuse to pay, the trustees may sue in the name of any one trustee or of their treasurer or clerk, and may recover the same, together with full costs of suit, in any court of record, by action of debt or on the case, by bill, plaint, suit, or information, wherein no essoign, &c.; and all such monies shall be vested in the trustees, and applied according to the provisions of the respective acts (*c*).

Mortgagees to account.

Every mortgagee in possession of any toll-gate or bar, or of any lands or tenements, the rents or profits of which are appropriated to the repair of any turnpike road, shall, within twenty-one days after notice in writing from the trustees, &c., render an exact account in writing to such trustees, &c., or such person as they shall appoint, of all monies received by such mortgagee, or by any other person on behalf of such mortgagee, together with an account of money expended in keeping or repairing the same. A default in rendering such an account is punishable with a forfeiture of 50*l.* to the use of the road, for any refusal, neglect, or omission (*d*).

Ejectment by one mortgagee.

Any mortgagee, as aforesaid, seeking to obtain possession of toll-gates, &c., in order to pay himself the principal money and interest, may sue as lessor of the plaintiff, and on his demise

(*a*) 9 G. 4. c. 77. s. 12.
(*b*) Id. s. 13.
(*c*) Id. s. 7.
(*d*) 3 G. 4. c. 126. s. 47.

only, without uniting the other mortgagees in such demises. Nevertheless, the person so obtaining possession shall not apply the tolls, which he may consequently receive, to his own use, but he must apply them to the use of *all* the mortgagees of the said premises *pari passu*, and in proportion to the several sums which may be due to them as such mortgagees (*a*). But he must pay the other mortgagees.

The trustees, &c., of roads are empowered to pay off their creditors by lot, when they wish to discharge a portion of their debt. Should they be desirous of doing so, and should all the interest on the principal monies be paid, or otherwise satisfied, they may, if they think fit, determine, by lot, to which creditors the whole, or any portion, shall be paid, instead of paying rateably amongst all the creditors, and they may pay such creditors accordingly, or they may pay any creditors, with the consent of the rest, without lot. The determination by lot must take place at a meeting, (holden according to the directions of the respective acts concerning meetings,) of which notice must be given, and of the purposes for which it is to be called, twenty-eight days at least preceding the same, by advertisement in some newspaper printed in, or usually circulated in, the neighbourhood of the road (*b*). Trustees may pay off creditors.

Should any mortgagee keep possession of any toll-gate, &c., either in person, or by means of others, and receive the tolls; or of any such rents, &c., such mortgagee having received his full debt, with interest and costs, he shall pay, as a penalty, to the trustees, &c., double the sum he may have received, over and above the sum originally due to him, with treble costs of suit, to be recovered by the treasurer or clerk, by action of debt, bill, plaint, or information, in any court of record, such penalty to be applied to the use of the road where the toll-gate was situate, or where the rents, &c., were so appropriated (*c*). Mortgagee keeping possession unlawfully.

But trustees are not *personally* liable to the payment of mortgages, or other turnpike securities, by reason of their having signed or executed them; and, further, in case any action, suit, or prosecution, be brought against them, in respect of the road, all their costs, charges, &c., of defence, shall be defrayed out of the tolls of the road (*d*). Trustees not personally liable.

If trustees execute a deed, which the act will not warrant, they are not estopped from saying that they have no interest, as they would be, if private persons: for the general principle, that a party is estopped by his own deed, does not apply to a case,

(*a*) 3 G. 4. c. 126. s. 49. See 2 B. & P. 219, Doe d. Banks v. Booth.
(*b*) 4 G. 4. c. 95. s. 60.
(*c*) 3 G. 4. c. 126. s. 48.
(*d*) 4 G. 4. c. 95. s. 61. 7 & 8 G. 4. c. 24. s. 3. See post, p. 189.

where trustees act not for their own benefit, but for that of the public. That point was decided, where trustees had mortgaged toll-*houses*, which they were not authorized, as the law then stood, to transfer (*a*).

Of toll-houses.

We conclude our observations on tolls, with the provisions of the legislature regarding the places where such tolls are collected. The trustees of any turnpike road are empowered to continue all the gates standing at the time of the passing of this act [the act of 1827, 9. G. 4.] in, upon, or across any such road, or on the sides of it, and to order, by writing, signed by three at least of the trustees present, at a special meeting held for the purpose, (which meetings may be holden from time to time,) the building of such and so many toll-gates, turnpikes, side-bars, and chains, with toll-houses, out-houses, and other conveniences * in, upon, or across such road, or on the sides, as they may judge necessary. Of such special meeting, however, public notice, specifying the time and place, must be given in some newspaper, published or circulated in the county, or counties, where the road lies, and also by affixing a copy of the notice on all the turnpikes, &c., or side-bars, (if any,) then being on the road, fourteen days previously. The trustees, moreover, may take in and enclose suitable garden spots on the sides of the road, for such toll-houses, not exceeding one-eighth of a statute acre to each toll-house, as they may appoint. And also, at any such meeting, or any other, to be called as aforesaid, they may, by a like order, direct any toll-gate, &c., to be taken down, or discontinued, or removed, or placed elsewhere, upon, across, or on the sides of the road, in such situations as may appear eligible to the trustees. But the above authority does not extend to authorize the erection of any gate, &c., where, according to a local act, no such gate, &c., is permitted to be placed (*b*).

Erecting, pulling down gates, &c.

Justices, when to remove gates.

Should the trustees exceed their power, by erecting or continuing any gate, &c., where they have no power to erect such gate under any act, the justices of the limit where the gate, so wrongfully standing, may be, may hear and determine in a summary way, at their general quarter-sessions, whether such power

(*a*) 2 Term Rep. 169. Fairtitle d. Mytton v. Gilbert.

* [Conveniences.] An act permitted trustees to make suitable buildings with *conveniences*. The defendant proposed to sink a *well* on his own ground adjoining a toll-house, and bear half the expense. The trustees concurred. The defendant did not pay his moiety, and the clerk to the trustees sued him and recovered. It was held, that the sinking of the well was within the authority of the trustees, for it was clearly a convenience; that the *contract*, though entered into by *one* trustee only, was binding, since the rest had adopted it, and that the *consent* of the trustees was a sufficient consideration, for their concurrence was necessary to the sinking of the well, under the act of parliament. 1 D. & R. 202, Newman v. Fletcher.

(*b*) 9 G. 4. c. 77. s. 5.

have been exceeded, upon a complaint to that effect, and may order the sheriff of the county, (who is authorized and required to execute the order,) to remove any such gate (*a*).

Lamps at toll-gates.

The trustees may order one or more lamps to be placed in front of each toll-house, and also to order at what times of the year such lamps shall be kept lighted. Collectors and lessees neglecting or omitting to observe the order of trustees as to the keeping and lighting of the lamps, are to pay 20*s.* for every such neglect, &c. And whoever shall damage or injure any such lamps, or extinguish the light, shall pay, for each offence, a sum not exceeding 40*s.* (*b*).

Toll-houses vested in trustees.

The right, interest, and property, of and in all these toll-gates, &c. weighing-machines, and other erections and buildings, lamps, bars, toll-boards, direction-boards, mile-stones, posts, rails, fences, with their appurtenances, together with the materials of the same, and all materials, tools, and implements provided for the repair of the road, and the scraping of the road, are declared to be vested in the trustees, &c. They are authorized to dispose of the same as they may think fit, and to proceed by action, or indictment, against any person digging up, breaking or pulling down, stealing, taking, or carrying away, spoiling, destroying, injuring, or damaging any such property as aforesaid, or interrupting them, or any of their officers in the possession of the same. It shall be sufficient, too, to state generally such articles to be the property of their clerk for the time being (*c*).

To be sold if useless.

When any toll-house, &c., belonging to trustees, &c., shall become useless, and be no longer required for the purposes of the road, the trustees, &c., shall cause it to be pulled down, together with the out-houses attached, and shall cause the materials to be sold or removed, and the site of such toll-house, &c., together with the gardens and appurtenances, may then be sold by such trustees, &c., in the same manner, and under the same regulations as are directed with respect to any land or ground not wanted for the purposes of the road. But they may not sell such houses, &c., standing (*d*).

Lessees may occupy toll-houses.

Further, the lessees, or farmers, of tolls, or persons appointed by them, may, during the lease, &c., of such tolls, occupy the toll-houses with all their appurtenances and conveniences, but for so long time only as such lessees, &c., shall pay the rent, and perform the covenants, agreements, and conditions of the lease (*e*).

(*a*) 3 G. 4. c. 126. s. 46.
(*b*) 7 & 8. G. 4. c. 24. s. 6. Ante, Ch. IV. p. 47.
(*c*) 3 G. 4. c. 126. s. 60.
(*d*) 4 G. 4. c. 95. s. 57. Ante, p. 126.
(*e*) Id. s. 58.

Trustees, when to take possession of toll-houses from the lessees.

It is, however, provided, that in case all or any of the tolls shall have been let as aforesaid, and the lessee, &c., shall neglect or refuse to perform the terms and conditions of the demise; or in case that the rent shall be in arrear for seven days next after any of the days on which it ought to be paid pursuant to the agreement; or in case any such lease or agreement shall in any other manner become void, any justice for the county or place, may, by warrant under his hand and seal, order a constable or other peace officer, with all necessary assistance to enter upon and take possession of such toll-house, &c., or chain, or weighing machine, together with the buildings and appurtenances, and to remove and put out the lessee, &c., so making default, or other person found therein, together with the goods belonging to such persons, and to put the trustees, &c., or any one of them, or their newly appointed officer or other person acting under their authority into the possession of the same. It shall thereupon also be lawful for the trustees, &c. (if they shall think fit), to vacate and determine the contract, &c. (if any), for demising the tolls, &c., and it shall be from that time void, (save as to the covenants or agreements for payment of the rent up to that time, or other covenants and agreements on the lessees' part, *which shall have been holden* *,) and the trustees, &c., may demise the tolls again to any other person, or cause them to be collected as if no former demise, contract, or agreement, had been made (*a*).

We have already seen that these toll-houses and weighing-machines are not rateable to the relief of the poor (*b*).

Other tolls for passing over ways.

Tolls, however, upon turnpike-roads, are not the only tolls for passing over a way which the law recognizes.

There were, originally, two kinds of tolls; 1. Toll-traverse, and 2. Toll-thorough. The former was for passing over the soil of another (*c*), not being a high street (*d*); the latter was where the owner of the toll had nothing in the soil, and was, therefore, bound to shew a consideration, as the repair of a road or bridge, &c. (*e*), whereas the dedication of the soil was a sufficient consideration in the first case (*f*). And that being a good consideration, there seems to be no reason why a good consideration should not be presumed for toll-thorough as well as for toll-traverse (*g*).

* The words of the act.

(*a*) 4 G. 4. c. 95. s. 59.

(*b*) Ante, p. 164.

(*c*) 1 Sid. 454, Heshord v. Wills. 22 Ass. pl. 58, Bro. Tolle, pl. 6, cites S. C.

(*d*) 2 Ro. Ab. Toll, 522.

(*e*) See Sir Wm. Jones, 162, Rex v. Boston Corporation.

(*f*) 1 Term Rep. 667, per Ashhurst, J. 2 Wils. 299. 12 East, 340, by Lord Ellenborough.

(*g*) 1 Term Rep. 667, per Ashhurst, J.

It was said in an old case, that it was a good prescription for any one to take a penny from every one passing over his land. This is a toll-traverse, a *quid pro quo*, and so it is of toll-thorough, where a man pays toll in a vill (*a*). All these, toll-traverse, toll-thorough, and toll-turn, a man may have in his own land, and may have an assise for them (*b*). But if the party have not the soil, he cannot claim the toll-traverse, and so it was held where toll was demanded in the highway (*c*).

So again, where toll was demanded for cleansing, &c., divers and many streets in Gainsborough, not saying *all* the streets, nor specifying them, the court rejected the claim, and observed upon the jealousy which ought to be preserved upon such occasions, where it was sought to levy money upon the subject (*d*). But where it was clearly shewn, that this liberty of passing over the soil of a certain manor, and the taking of toll for so doing were both immemorial, and that both the soil and the tolls were in the same hands originally, the court presumed that the soil was granted to the public in consideration of the payment of toll, and held the claim good for a toll-traverse, such original grant being of itself in this respect a sufficient consideration (*e*).

And accordingly, in a previous case relative to the same right, where it did not appear that the crown had owned the soil, it was determined otherwise, because no consideration appeared for the toll (*f*).

We shall now close this chapter with a consideration of the various penalties, remedies, forms of proceeding, &c., which have not been hitherto mentioned.

First as to the penalties under the highway-act.

Penalties under 13 G. 3. c. 78.

Any person resisting, or making forcible opposition against any one employed in executing the act, or making any rescue of the cattle or other goods distrained thereby, shall forfeit a sum not exceeding 10*l.* nor less than 40*s.* on conviction before a justice, at the discretion of such justice. The same penalty attaches on any constable, head-borough, or tithing man, refusing or neglecting to execute or obey any warrant or precept granted by a justice pursuant to the act. These forfeitures are to be

(*a*) 5 H. 7. 10, by Fairfax, J.
(*b*) 8 Rep. 46.
(*c*) Mo. 574, Smith v. Shepherd. Cro. El. 710, S. C. And see Keilw. 152.
(*d*) 2 Wils. 296, Truman v. Walgham.
(*e*) 1 Term Rep. 660, Lord Pelham v. Pickersgill. Tolls cannot be taken for passing over a navigable river. See also 3 Lev. 424, Crispe v. Belwood. 1 Mod. 131. 2 Mod. 243.
(*f*) 1 Term Rep. 664, Lord Pelham v. Haigne, cited.

paid to the surveyor of the ways for the parish, township, or place, where the offence is committed, and are to be laid out in repairs. The justice is to commit the offender to the common gaol, or house of correction of the limit, on non-payment, for a time not to exceed three months, unless the forfeiture be paid sooner (*a*).

Penalties, &c. under 13 G. 3, how recovered, when no specific mode is otherwise pointed out.

All penalties, &c., under the highway act, with all costs and charges, (*the manner of levying which is not hereby otherwise particularly directed,*) shall be levied by distress and sale of the offender's goods and chattels, or those of the party liable or ordered to pay the same. This must be done by warrant under the hand and seal of a justice for the limit where the offence, &c. has happened, or the order for payment has been made. Any overplus is to be restored, the charge of the distress being first deducted, and the justice is bound to grant the above warrant, upon conviction of the offender, either by confession or the oath of a credible witness, or upon order made as aforesaid. These penalties are to be paid as follows: one half to the informer, the other half to the surveyor of the highway * where the offence or default has happened, and are to be applied towards the repairs, unless otherwise directed by the act. But if the surveyor be the informer, then the whole shall be applied to the repairs. Should the distress not be found, and the penalties, costs, &c., be not paid, the justice must commit the offender, or defaulter, by warrant as above, to the common gaol, &c., for any time not exceeding three months, unless the sum required be sooner paid.

Offender out of justice's jurisdiction.

Should the offender, &c., live out of the jurisdiction of the justice authorized to grant the warrant, any justice of the limit where the party inhabits, upon request to him made for the purpose, and upon a true copy of the conviction, and of the order for payment of such costs, &c., being produced and proved by a credible witness upon oath, shall, by warrant as above, cause the penalty, &c., and the costs, &c., or so much as shall not have been paid, to be levied by distress and sale, as above, and to commit the offender, as above is stated, should no sufficient distress be found (*b*). But no warrant of distress, unless the act direct otherwise in any case, shall be issued for levying such sums as have just been mentioned, until six days after conviction, and until an order have been made and served for payment (*c*).

Six days allowed before distress.

(*a*) 13 G. 3. c. 78. s. 72.

* In an old case, replevin was brought for taking cows. The defendant made cognizance as bailiff to the lord of the leet, because the plaintiff was amerced there for not securing a ditch in a highway. The plaintiff demurred, because the statute of Elizabeth [then in force] gave the forfeitures for highways to the surveyor, but judgment was given for the defendant, because the party might be punished in the leet. Sir Tho. Raym. 250, Stephens v. Hayns.

(*b*) 13 G. 3. c. 78. s. 73.

(*c*) Id. s. 74.

Action or information for penalties.

Every prosecutor or informer may sue for and recover any forfeiture, &c., of the amount of 40*s.* or upwards, either in the manner hereinbefore directed [as above], or by action in a court of record, at his election, that is to say, where the manner of recovery is not particularly directed by the act. In the case of a pecuniary penalty, it shall be sued for by action of debt, in which it shall be sufficient to declare that the defendant is indebted to the plaintiff in the sum of ——*l.*, being forfeited by an act passed in the thirteenth year, &c. [name the act], and the plaintiff, if he recover, shall have double costs (*a*). There shall not, however, be more than one recovery for the same offence, and the party offending must have ten days' notice in writing previous to action brought, and such action must be commenced within one calendar month after the offence (*b*).

Notice.

Credible witness.

No conviction shall be had before a justice unless upon confession, or the oath of a credible witness, or upon view, as the case may be. But inhabitants, as such, may be witnesses in regard of offences within the parish, &c., where they live (*c*).

Oath.

Any justice may administer an oath to any witness, or other person, for the better discovery or execution of the matters directed under the act (*d*).

Satisfaction for special damage.

In the case of any distress made under the act, it is provided, that the distress itself shall not be deemed unlawful, nor the party making it a trespasser, by reason of any default or want of form in any proceeding relating thereto, nor shall such party distraining be deemed a trespasser *ab initio* by reason of any irregularity subsequently committed by him. Nevertheless, the person aggrieved by such irregularity may recover full satisfaction for the special damage in an action on the case (*e*). And again, no plaintiff shall recover in any action for any irregularity, trespass, or wrongful proceedings, if *tender of sufficient amends* have been made by the party making the irregularity, &c., before action brought. Should no such tender be made, the defendant, by leave of the court where the action is depending, may, at any time before issue joined, pay such sum as he may think fit, and thereupon such proceedings, &c., shall be had as in other actions where the defendant is allowed to pay money into court (*f*) *.

Tender of amends.

Where the act points out a tribunal where the sufficiency of

(*a*) 13 G. 3. c. 78. s. 75.
(*b*) Id. s. 76.
(*c*) Id. s. 77.
(*d*) Id. s. 78.
(*e*) Id. s. 79.
(*f*) Id. s. 80.
* Similar provisions are enacted by the turnpike act. 3 G. 4. c. 126. s. 144.

amends is to be decided, it cannot be questioned at Nisi Prius. Therefore, where by the 27th and 29th sections of the act now under consideration, refuse stones were allowed to be taken away by the scavenger upon making satisfaction, *to be settled and ascertained by an order of justices,* the particular tribunal to adjudge the amends was clearly pointed out. The plaintiff, notwithstanding, brought his action, the defendants paid 24*s.* into court, and the question between the parties was as to the sufficiency of the amends. But, for the reason above given, the learned judge at Nisi Prius nonsuited the plaintiff, and his opinion was holden to be correct by the Court of King's Bench (*a*).

Penalties, &c. under turnpike acts.

All penalties, forfeitures, and fines under turnpike acts, (the manner of levying which is not otherwise directed,) shall, upon proof and conviction before a justice of the county, &c. where the offence has been committed, (as the case may require,) either by confession, or the oath of a witness, (which oath the justice is to administer,) be levied, together with the costs attending the information and conviction, by distress and sale, &c. by warrant, &c. [as in the highway act above mentioned], which warrant the justice is required to grant. The overplus is to be returned on demand, &c. In case, however, that such fines, &c. shall not be paid, the justice may order the offender to be kept in custody, until return can be conveniently made to the warrant of distress, unless the offender give sufficient security to the satisfaction of the justice for his appearance before the justice on the day of the return of the warrant, which must take place so as there be not more than seven days from the taking of such security. The security is to be taken by way of recognizance or otherwise. Should it appear that no sufficient distress can be had on the return of the warrant, such justice must, by warrant, &c., send the offender to the common gaol, &c. where he shall remain without bail or mainprize for a time not to exceed three calendar months, unless the forfeitures, &c. be sooner paid. The monies, &c. to be paid (if no other direction be given by the act) one moiety to the informer, or person suing, the other to the treasurer, and to be applied to the purposes of the road (*b*).

Justice may summon.

The justice to whom complaint may be made of any offence against the act, may summon the party before him, and determine the matter on such summons, and on proof convict and adjudge the penalty, and may proceed to recover, although no information in writing have been exhibited or taken before him.

(*a*) 13 East, 200, Boyfield v. Porter. And see ante, p. 108; and as to the levying of rates for the reimbursement of inhabitants, the payment of fines, &c. ante, p. 93.

(*b*) 3 G. 4. c. 126. s. 141.

Such proceeding by summons is to be as valid as if it were carried on by information (*a*).

Prosecutor, how to proceed.

Every prosecutor or informer may sue for and recover any penalty, &c. as follows: if it exceed 20*l.* or upwards, he may proceed by action of debt in any court of record, and it shall be sufficient to declare that the defendant is indebted to the plaintiff in the sum of ——, being forfeited by [set forth the name of the act.] The plaintiff, if he recover, is to have full costs; but there may not be more than one recovery for the same offence. Moreover, twenty-one days' notice must be given previously to commencing the action; and it must be brought within three calendar months after the offence. Should, however, the forfeiture be less than 20*l.*, yet more than 5*l.*, it shall be only recoverable before a justice, subject to an appeal, (as we shall presently see); and should it not exceed 5*l.* then it shall be recoverable in like manner only by information before a justice, and no writ of *certiorari* to remove the same shall be allowed (*b*). There are the same provisions respecting satisfaction for special damage, and tender of amends as in the highway act. These have been already mentioned, and the reader is, therefore, referred for them to a prior page (*c*).

The time for proceedings before a justice is limited to six months. For no person shall be convicted for an offence against the turnpike act, in a summary way, before any justice, after the expiration of six months from the commission of the offence (*d*).

Penalties under former acts.

The act of 1822 declared, that it should by no means be construed to prevent or defeat any prosecution commenced for any offence committed under the old acts, nor to prevent the recovering of any penalty consequently incurred, but, on the contrary, that all penalties, encroachments, nuisances, and other offences, might be sued for, abated, or prosecuted in like manner as though no new act had ever passed (*e*).

Appeal.

Having mentioned the subject of appeal in the last pages, it may be proper to consider that remedy as it applies *generally* to highways and turnpike roads, for it has been already touched upon in discussing the mode of stopping up roads under the 55 G. 3.

Under highway act.

It is provided, that whoever shall think himself aggrieved by

(*a*) 4 G. 4. c. 95. s. 83.
(*b*) 3 G. 4. c. 126. s. 143. That is, to remove either information.
(*c*) Ante, p. 183. And for the punishment of persons refusing to appear as witnesses, &c. on such occasions, see post, Ch. X. on Evidence.
(*d*) 9 G. 4. c. 77. s. 18.
(*e*) 3 G. 4. c. 126. s. 3.

any thing done in the execution of the act * by a justice or other person, and for which no particular method of relief has been appointed, may appeal to any quarter sessions of the limit where the cause of complaint has arisen. The appellant must give notice in writing of his intention, and of the matter of appeal, to the justices, &c. within six days after the cause of complaint, and must, within four days after the notice, enter into recognizance before some justice within such limit, with one sufficient surety, to try such appeal, abide by the order, and pay the costs. Then the justice, who has received such notice, must return all proceedings touching the matter of the appeal to the sessions, on pain of forfeiting 5*l.* The justices at sessions shall then, upon due proof of notice given, and of the recognizance, determine the matter in a summary way, and award costs at their discretion to either party to be levied and recovered as before mentioned (*a*), and their determination shall be final. The proceedings *under the act* are not to be quashed for want of form, nor removed by *certiorari*, or other writ, &c. (except as before mentioned (*b*).) And further, no such appeal shall be made against a conviction for any penalty or forfeiture, unless the party convicted give notice of his intention to appeal, at the time of the conviction, if he be present, or, if not, within six days afterwards, and also enter into recognizance with sufficient surety, to pay the penalty, &c. in case the conviction should be affirmed; and upon the giving of such security, the further proceeding for such penalty, &c. shall be suspended until the determination of the appeal (*c*).

Appeal under turnpike acts.

Very similar provisions are enacted with respect to appeals against the orders, &c. of justices, or trustees acting by virtue of turnpike acts. There must, however, be two sureties, and the appeal must be to the next sessions. But should there not be time to give the notice, nor enter into the recognizance before the next sessions, the appeal may then be to the next following sessions. Provided, that no appeal be allowed against any conviction for a penalty, &c. which does not exceed 40*s.* (*d*) *

There have been some decisions on the subjects of this appeal,

* With respect to the words, "other matter or thing done in pursuance of this act," as used occasionally in local acts, see 8 East, 41, Rex v. Kingston.

(*a*) Ante, p. 182.

(*b*) Ante, pp. 88, 89.

(*c*) 13 G. 3. c. 78. s. 81.

(*d*) 4 G. 4. c. 95. s. 87.

* The judgment of the justices or petty sessions respectively is conclusive in the case of surveyors' accounts, and no appeal, therefore, lies against their allowance. 5 Term Rep. 629, Rex v. West Riding of Yorkshire Justices. 5 Term Rep. 701, Rex v. Mitchell. 2 Lord Keny. Rep. 499.

of the costs, and of the *certiorari* generally, which we proceed to mention.

Six days after the cause of complaint.

It has been determined, that where a levy was made under a warrant of distress, the real injury was the distraining, for it did not follow as a matter of certainty that the warrant would have been enforced, consequently, that notice given within six days after the actual distress was sufficient. And it was further held, that the grounds upon which it was to be contended, that the distress had been irregular need not be stated upon such occasions, and that where the party points out the matter of his appeal, it is sufficient without assigning special causes (*a*).

Costs.

Notice of appeal was given against an order for diverting a footway, but the order was not filed with the clerk of the peace for confirmation and enrolment, and the justices before the next sessions gave the appellant notice that they abandoned the order. He applied for his costs in preparing to try the appeal, but the justices at sessions refused the application, and the Court of King's Bench held their decision to be right. It was contended that the justices might give costs under 13 G. 3. c. 78. s. 81, but the court seemed inclined to think, that a specific remedy had been provided under the 55th G. 3., whereas the former statute gives the appeal only where no other remedy is pointed out, and besides, there had neither been a notice within *six days*, nor a recognizance, as thereby required (*b*).

Certiorari.

If a *certiorari* be applied for before trial, the *indictment* may be removed, if afterwards, the conviction can only be so treated; if it make mention of the indictment only, and not of the conviction, it may be quashed, and if the party take it out before conviction, but will not use it till after, he will lose the benefit of it (*c*). Therefore, where a case had been heard at the sessions, the court refused a *certiorari* moved for in order to take objections to the indictment (*d*). A rule *nisi* for a *certiorari* to remove the appointment of surveyors had been obtained, but the court stopped the counsel against the rule upon their citing the 81st section taking away the *certiorari*, and said, that as an appeal lay against the appointment of surveyors, the writ in question was taken away by express words; and it was said, that, supposing the words of the section were confined to cases in which an appeal might be had, the applicant must shew, that no appeal would lie in the particular case, which he could not (*e*). On the other hand, where there is no competent jurisdiction to

(*a*) 1 M. & S. 411, Rex v. Devon Justices.
(*b*) 4 B. & C. 184, Rex v. Wing.
(*c*) 1 Salk. 150.
(*d*) 1 B. & C. 142, Rex v. Pennegoes and Machynlleth Inhabitants.
(*e*) 3 B. & C. 698, Rex v. St Alban's Justices.

do an act, the *certiorari* survives. And, therefore, where the justices at petty sessions exercised an *original* authority over surveyors' accounts, and, again, where an order of sessions interfered with the powers of commissioners under a turnpike act, writs of *certiorari* were granted, for the proceedings in these cases were *coram non judice* (*a*). However, where the justices have jurisdiction, the *certiorari* does not revive, although they may proceed informally; and so it was decided, where they made an order under the highway act, for they proposed to do that (although informally performed) which was clearly within the scope of their authority (*b*). But the prosecutor, as we have above shewn, may have this writ; and it has been so decided on many occasions (*c*). And, although it be moved for on behalf of the *defendant*, yet if the right of the crown be in question, it must issue, for the king is not bound by the ordinary rule. And there is no occasion for an affidavit to prove the right of the crown, for the king's attorney-general may demand the writ in such cases. It was thus decided on a motion to remove an indictment *for obstructing* a highway (*d*).

Forms of proceedings.

The highway act declares, that the forms of proceedings relative to the several matters contained in it, which are set forth and expressed in the schedule annexed thereunto, shall be used on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case. No objection is to be made or advantage taken for want of form in any such proceedings by any person whomsoever (*e*). There is a similar provision in the turnpike law (*f*).

The next points for our consideration are the competency of suing the officers of highways or turnpikes for any act done by them under colour or in the execution of their offices, together with the forms necessary to be observed in the prosecution of such a design.

Actions against trustees.

First, as to trustees. They may sue and be sued in the name of any one trustee, &c. or of their clerk* for the time being.

(*a*) 5 B. & C. 816, Rex v. Somersetshire Justices. Id. 818, n.

(*b*) 3 D. & R. 36, Rex v. Casson.

(*c*) See ante, p. 88.

(*d*) Sayer, Rep. 128, Rex v. Burgess, and see 4 Burr. 2456, Rex v. Clace Inhabitants. This case of the King v. Burgess was subsequently tried at bar. It related to the public right of way through Richmond Gate and East Sheen Gate across Richmond Park. A right for *foot passengers* only was established upon an indictment for obstruction; and convenient ladders for public use were then provided. 2 Burr. 908, Rex v. Burgess.

(*e*) 13 G. 3. c. 78. s. 70.

(*f*) 3 G. 4. c. 126. s. 148.

* One agreed in writing to pay the rent of tolls "to the treasurer of the commissioners." It was held, that no action could be maintained in the name of the *treasurer*, for the contract was with the commissioners. 3 B. & P. 147, Pigott

No action either by or against them shall abate or be discontinued by the death or removal of the trustee who is sued, or of the clerk, is or by the act of any trustee, or clerk, without the consent of the other trustees. Such trustee as aforesaid, or the clerk, is to be plaintiff or defendant, provided that such persons be reimbursed and paid out of the turnpike monies for all costs, charges, &c. by reason of the suit (*a*).

It is provided, however, that no trustee shall be personally liable (except as shall be presently mentioned) to the payment of any sum laid out or expended on any road, and that no execution shall issue against his goods by reason of his having acted as such trustee, or by reason of his having signed any contract or security to be entered into relating to the road, unless the trustee shall have rendered himself in express words so personally liable in such contract or security (*b*). The exception just alluded to is this:—every trustee who shall order the expenditure of money towards the making, repairing, or altering of any road not within his trust, or for the doing of any thing not authorized by any turnpike act, shall in that case be *personally liable* to the trust for the repayment of such money, at the suit of any person, or of any one trustee, or of the clerk, on behalf of the trust. The costs and charges of such suit, over and above the costs recovered from the defendant in such suit, are to be borne by the trust (*c*).

As a general principle, a public officer is not liable for consequential damage done to any person in the execution of his office, provided that he use his best skill, and act without malice. This principle applies to trustees. So that where an act enabled them to make watercourses to prevent the road from being overflowed, and accordingly, they adopted a recommendation of their surveyor for that purpose, but in effecting it, the plaintiff's land was inundated, it was held that no action could be maintained against the chairman who had signed the order, for although the act prescribed the thing to be done, it did not ordain the manner of doing it, and the defendant was exercising a duty imposed upon him by the legislature, from which he could not shrink, and which he performed, as far as in him lay, with every possible caution (*d*). So where an act empowered certain turnpike trustees to lower hills and raise hollows, but in

v. Thompson. Certain commissioners under a local paving act were empowered to sue in the name of their clerk for penalties, rates, &c. due and payable from any water or gas company, or commissioners of sewers, *or any other person*. It was held, that the commissioners might sue in the name of their clerk to receive from the assignees *of their* banker the balance in his hands when he became bankrupt. 5 B. & C. 611, Frost v. Bolland.

(*a*) 3 G. 4. c. 126. s. 74.
(*b*) 7 & 8 G. 4. c. 24. s. 3.
(*c*) Id. s. 2.
(*d*) 6 Taunt. 29, Sutton v. Clarke. 1 Marsh, 429, S. C.

so doing, the plaintiff's entrances from the highway through his gates into his pleasure-ground were obstructed, and part of the materials of the road fell into the plaintiff's premises, damaging his hedge and plantations; after action brought, and verdict for the defendant, the court refused a rule for a new trial, for the judge had directed the jury to find for the plaintiff, if they thought that the trustees had acted arbitrarily, oppressively, or carelessly, and such improper conduct being negatived by the verdict, there was no ground for holding the trustees liable (*a*). And, of course, these officers were held not to be responsible for a mere non-feazance. Certain trustees were required to place lamps along the road, if they should think necessary, they were also empowered to make contracts for cleansing the road, to remove obstructions and abate nuisances, and to take a night toll, for the purpose of enabling them to light and watch the road. In cleansing the highway, the labourers heaped the scrapings in round heaps, on both sides of the road, and on that side where the plaintiff's house was, some heaps stood before his house and shop, about three feet from the curb-stone, which were an annoyance to the housekeepers and to passengers. The plaintiff's wife fell over one of these heaps and broke her arm, and the clerk to the trustees was sued in case for this mischief. Lord Ellenborough, however, nonsuited the plaintiff, thinking that the trustees were too far removed from the cause of it to be liable, and the rule for a new trial was refused (*b*). "If," said the noble judge, "by omitting to put up lamps when it is necessary, they are guilty of a breach of public duty, they may be indicted for it; but to hold that every trustee of a road is liable in damages for such an accident as this, would, I conceive, be going farther than any case warrants." (*c*)

The same principle has been acted upon in the cases of commissioners under *Paving Acts*, when sued upon similar occasions. Certain commissioners for paving a street in Surrey were empowered to cause the street to be paved, repaired, raised, sunk, or altered. The defendants were paviors acting under the authority of these commissioners, and, in laying out the ground according to a level marked out, they obstructed the plaintiffs' gateway, so that waggons and other carriages were prevented from going to their warehouses, and were, by necessity, unloaded in the street. The court held, that an action could not be maintained upon this occasion, for no excess of jurisdiction had been exercised, and unless such were the case, no remedy could be had in a matter which concerned the public interest, and, inde-

(*a*) 2 B. & C. 703, Boulton v. Crowther. 4 D. & R. 195, S. C. S. P. 1 Man. and Ry. 187, Humphreys v. Mears. But if the officer interfere *personally*, the case may be different.—In S. C.

(*b*) 4 M. & S. 27, Harris v. Baker.

(*c*) Id. 29.

pendently even of that ground, the act in question pointed out a particular mode of redress, for the commissioners were enabled to award an allowance in certain cases (*a*). Again, the clerks to certain commissioners for lighting, paving, and watching Birmingham, were sued in consequence of an injury which the plaintiff received by falling into a ditch, when riding, and breaking his thigh. A deep ditch had been dug by the order of the defendants, and a quantity of rubbish was placed near it, and left without any guard, or light, by night and day. It was contended, that unless these persons were liable, the public might be without remedy for any mischief occasioned by the grossest negligence; but on the principle, that no action can be maintained against a man who acts gratuitously for the public for the consequence of any act which he may be authorized to do, the court directed a verdict to be entered for the clerks (*b*). But where the parties are acting for their own benefit, the case is different, whether they be employed as servants for hire under irresponsible commissioners, or be themselves an independent body. And thus it was, that the West London Water Works Company were held liable for negligence in making an excavation, and throwing up rubbish in a public street, whereby the driver of a stage-coach was overturned, and injured, for here was a corporation acting for its own benefit (*c*). So paviors were considered to be answerable for raising the street in the front of the plaintiff's house, and so obstructing his passage and lights (*d*). For the power of commissioners is not arbitrary, but limited to reason and law, and here they had greatly exceeded their powers (*e*).

Action against the whole body of trustees.

In a case where it appeared, that, under the provisions of a turnpike act, if any person had a cause of action against the trustees, he should sue the treasurer, that the plaintiff had been aggrieved by the act of five trustees, who formed a quorum, but that the particular promise, upon which he sued in assumpsit, would not render the *whole body* liable, the court ordered a nonsuit to be entered, in an action against the *treasurer*, inasmuch as the act substituted the treasurer for the entire body of the trustees, and as they were not collectively liable, it was clear that the defendant could not be so (*f*).

(*a*) 4 Term Rep. 794. The Governor, &c. of the British Cast Plate Manufacturers v. Meredith.

(*b*) 2 Bingh. 156, Hall v. Smith.

(*c*) 3 Campb. 403, Matthews v. West London Water Works Company.

(*d*) 3 Wils. 461, Leader v. Moxton. 2 Sir W. Bl. 924, S. C. It is observable, that in this case the action was brought against the *immediate agents* of the damage. See 4 Term Rep. 796, observations of Lord Kenyon, Ch. J. upon the report of the above case in *Wilson*. See 5 B. & A. 837, Jones v. Bird.

(*e*) 2 Sir Wm. Bl. 926.

(*f*) 7 Taunt. 1, Everett v. Cooch.

Notice of action against turnpike officers.

The various turnpike acts commonly prescribe, that a notice of action shall be served upon the officers before they can be sued, and we have seen, that the act of 1822 directs, that twenty-one days' notice shall be the ordinary time required for such notice. A trustee was sued in debt for penalties for letting out his horses and cart to hire contrary to the law in that respect, but it was not stated in the notice of action, that the defendant was a trustee *acting* in the execution of the act, and the notice was consequently holden *bad*. It was further held, that the omission to give a proper notice did not merely bar the plaintiff of his right to costs, as had been contended in argument, but of his right of action altogether (*a*). The substantial part of the enactment just referred to is, that trustees or other officers should have notice in order that they may tender satisfaction, and that the action should be brought promptly after the fact committed. But it was contended, on the occasion where the terms of a local act were similar to those above mentioned, that the statute applied to actions of *tort* only, and, therefore, that in *assumpsit* against a toll-collector, it was neither necessary to give the twenty-one days of notice, nor to be particular in bringing it in the county where the matter arose. But the court thought otherwise, for in many cases the plaintiff may waive tort, and bring assumpsit, and they said, that whatever was done in pursuance of the act came within that provision which required notice. The *postea* was delivered to the defendants (*b*). A notice of action against a toll-gate keeper "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, intituled," &c. has been holden uncertain and bad (*c*).

We have seen, that the late turnpike acts contain clauses which extend all the powers and provisions of former acts to the new statutes. This, as will be seen from the following case, is a provision extremely necessary. The Highway Act directs, as has been mentioned, that actions shall be brought in the county where the fact has been committed, and not elsewhere. A subsequent statute, which imposed new obligations upon persons entitled to the above privilege under the Highway Act, was silent in that particular, and it was consequently holden, that actions under the latter statute need not have been brought in the county where the thing complained of had been done (*d*). The present turnpike law remedies this omission by an express provision.

(*a*) 5 B. & C. 125, Towsey v. White.
(*b*) 4 B. & C. 200, Waterhouse v. Keen.
(*c*) 2 Chit. Rep. 673, Freeman v. Line.
(*d*) 5 Term Rep. 16, Bazing v. Skelton. See Burn's Justice, ed. 23, Vol. II. p. 750. n. (*a*).

Limitation of actions.

The Highway Act declares, that every action or suit against any person, for any thing done in pursuance of that act, must be commenced or prosecuted within three calendar months after the fact committed, that such action, &c., must be brought in the county where the act has been done, that the defendant may plead the general issue, and give the act and special matter in evidence, and that the same may have been done in pursuance of, and by the authority of the act. If the same appear to have been so done, or if any action, &c., be brought after the time limited, or in any other place than that pointed out, the jury shall find for the defendant. Should the plaintiff become nonsuit, or discontinue after appearance, or should judgment be given against the plaintiff on demurrer, the defendant shall have treble costs, and have the like remedy for recovering them as in other cases, according to law (*a*).

Similar provisions will be found in the turnpike act referred to (*b*).

Within three calendar months.

Certain surveyors of the highway, in the course of some improvements which they were carrying on in the street in Penzance, undermined the plaintiff's wall. This took place in May 1810. On the 31st of January, 1811, the wall fell down, and the action was commenced on the 13th of the following April, whereupon it was objected, that under the above section of the Highway Act, the defendants were entitled to a verdict, for the thing done was the digging up the highway, and not the falling of the wall, which was the mere consequence of that wrongful act. A verdict passed for the plaintiff, and the court refused a rule for entering a nonsuit, for the consequential damage was the gravamen, and an action on the case could not have been sustained until the specific wrong had happened (*c*).

This authority was mentioned on a subsequent occasion, when Lord Chief Justice Gibbs observed, that he should have had great difficulty in coming to the same conclusion, because the act directed the action to be brought within six months after the *doing* of the thing complained, but his Lordship added, that the Court of King's Bench had followed the justice of the case (*d*). It did not become necessary to decide the point as to the limitation of time, in the case where Gibbs, Chief Justice, expressed himself in this manner.

(*a*) 13 G. 3. c. 78. s. 82.
(*b*) 3 G. 4. c. 126. s. 147.
(*c*) 16 East, 215, Roberts v. Read.
(*d*) 1 Marsh. 437, and see id. 435.

Mortgagee.

We have already seen, that a mortgagee of tolls is competent to maintain ejectment (*a*).

Actions by officers.

It does not follow, that because penalties are imposed for offences, a right of action is taken away from parties aggrieved, as in the case of a scavenger, who was allowed to maintain an action for taking away dust, although an act of parliament treated such a proceeding as an offence, and imposed a fine of 10*s.* for so doing (*b*).

Prosecutions and actions by trustees, &c.

Trustees, &c., are empowered, if they think fit, at a public meeting, to direct prosecutions by indictment, or otherwise, for any nuisance, or other offence done, or committed, on the road; or to recover any penalty or forfeiture incurred under the provisions of turnpike acts, at the expense of the revenues arising from the road, such expenses to be allowed to such trustees, &c., at some subsequent meeting (*c*).

Toll-collector.

It has been held, that if a person recognize the right of a toll-collector, although he be illegally appointed, the trustees at the same time making no objection, he is estopped from setting up the informality or nullity of the appointment.

The administratrix of a toll-gatherer brought an action for monies due to her intestate. She had sent to the defendant an account of the debt, and he sent 5*l.* inclosed in a letter to her, stating that she should have the remainder next week. This was held to be evidence to be an account stated (*d*).

And by Le Blanc, J.: "Shall it be permitted to a third person, after having treated with the intestate, as a person legally entitled to receive the tolls, and having actually settled an account with him for the amount, shall it be permitted to such an one now to object to the plaintiff's recovery, not upon the special count, but upon the account stated?" (*e*)

(*a*) Ante, p. 176.
(*b*) 2 Chit. Rep. 582, Ward v. Bird.
(*c*) 3 G. 4. c. 126. s. 133.
(*d*) 10 East, 104, Peacock v. Harris.
(*e*) Id. 108.

CHAPTER VIII.

Of Bridges and Ferries.

Section I.—Of Bridges.
Section II.—Of Ferries.

Section I.—Of Bridges.

Bridges are public or private.

A public bridge is a common king's highway.

A private bridge, as to a mill, &c., is similar in its nature to a private right of way, and subject to most of its incidents.

We propose to consider in this chapter,

I. What is a public bridge.

II. By whom, and how, it is to be built, &c.

III. Of other incidents relating to bridges—as rating tolls, punishment of annoyances, &c.

IV. Lastly. Of the liability to repair, and the various remedies for non repair.

I. What a public bridge.

The principal circumstance necessary to constitute a public bridge is, that people at large may have a free and uninterrupted user of it, not upon sufferance, but as a matter of right. The mode of construction and the manner of continuance, are matters which deserve consideration upon inquiries of this nature, but they must be weighed as connected with other facts, and are of much or little weight in proving a general privilege, in proportion as they are supported or contradicted in that respect. A bridge may have originated in the convenience and for the protection of an individual, and may yet be of public right. It may not even be open at all times, but the user of it may be restricted to certain seasons. Thus, a bridge was used by the public at all times, on foot and with horses, but only occasionally with carriages, except in times of flood, or frosts, when it was usual to pass through the river beneath, and then carriages

always passed over the bridge. It was said by the court in this case, that such a limited enjoyment was quite consistent with the idea of a public bridge (*a*). Again, a causeway and bridge were only used by the public in time of floods, and in the time of very high floods the bridge itself was impassable, but they were at all times open to the public. It was holden, that this was a public bridge (*b*).

II. Who to build, and how built.

Sometimes a bridge is built by the county, sometimes by private persons, but it has been held, that the owner of an ancient ferry cannot suppress the old right, and erect a bridge, without a licence for that purpose, under the writ of *ad quod damnum* (*c*). But, in general, it is competent for any one to build a bridge, although, if it be likely rather to burthen the county, than benefit the public, the county may interfere, and hinder the erection. No one can be compelled to make a bridge, except by act of parliament, where none existed before (*d*), and so it was ordained by the great charter (*e*).

Bridges, however, are very frequently made by companies under the authority of acts of parliament, and then, as we shall see by and by, the expense of maintaining them falls upon the body who are thus acting for their own benefit. It follows, from hence, that where it is needful the county may erect a passage of this kind, for the expense both of its creation and repair falls necessarily upon them; and, indeed, powers are given to the justices at sessions to obtain land* for the purpose. For they may, in any county, city, &c., at their general, or general quarter-sessions, or the major part of them may agree with any person, or body politic, for the purchase of any piece of land joining, or near any county bridge within the limit, for enlarging or more conveniently rebuilding the same, provided such purchase do not extend to more than one acre. The money is to be paid out of the county rate by the treasurer, under the authority of the justices, under their hands and seals, and the lands are to be conveyed to such persons as the justices shall appoint in trust for the above purpose (*f*). "If the words of the statute be taken strictly," says Mr. Justice Buller (*g*), "they would be confined to the sum contracted for with the seller; but the purchase cannot be completed without some other contingent expenses, taking

(*a*) 2 M. & S. 262, Rex v. Northamptonshire Inhabitants.
(*b*) Ry. & M. 144, Rex v. Devon Inhabitants. See 2 Campb. 455.
(*c*) 1 Salk. 12, Payne v. Partridge.
(*d*) 2 Inst. 701.
(*e*) 9 H. 3. c. 15.
* That land given for the repair of bridges must be let at its fair value, see ante, p. 93.
(*f*) 14 G. 2. c. 33. s. 1.
(*g*) 4 Term Rep. 596.

an abstract of the title, drawing the conveyance, &c., which must therefore necessarily be included in the act."

How built, &c.

Whoever undertakes to build a bridge, must, nevertheless, so construct it as to be of public utility, for if it be done in a slight and imperfect manner, for the purpose of throwing the expense upon the county, it will become a public nuisance, and so indictable (*a*). And so it is in the case of private bridges, if they become public nuisances (*b*).

The legislature, at length, interfered to point out the description of public bridges. It is accordingly declared, that no bridge hereafter to be built in any county [or hundred, &c. 54 G. 3. except as to future bridges] by any individual or body politic, shall be deemed to be a public bridge, liable to be repaired by the county, &c., unless it be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices at their general quarter-sessions, or the justices of Lancaster at their annual general sessions. The surveyor, or person so appointed, is to superintend the erection of the bridge, when requested by the parties desirous of erecting it; and in case the said parties be dissatisfied, the said justices shall determine the matter at their respective sessions (*c*). Again, the bridge must be built in the highway, if a public bridge, and no indictment will lie for the non repair of any other bridge (*d*).

Changing the situation of bridge.

Before the statute above referred to, justices at sessions had no power to alter the situation of bridges (*e*); that must have been done by an *ad quod dammum*, or by authority of parliament (*f*). But that act gave them impliedly the authority to do so, for the words "enlarging or more conveniently rebuilding," enable them to suit the public convenience by varying the position of the bridge, and changing the road (*g*).

Right of property in bridge.

The right of property in a bridge is precisely analogous to that of the highway, which we have seen to remain in the adjoining proprietor in land, subject to a right of passage by the public (*h*). Sir G. W. permitted the plaintiff to build a bridge over his land, for public use, it was to be repaired by the plain-

(*a*) 2 East, 348, by Lord Ellenborough. Id. 352, by Grose, J.
(*b*) 6 Mod. 255, by Holt, C. J.
(*c*) 43 G. 3. c. 59. s. 5. Orders respecting bridges in Yorkshire are to be made at the Easter sessions. Save, that, in cases of emergency, any two justices of any riding may give orders for the making of temporary bridges, or temporary repairs. Id. s. 6. The act does not extend to bridges repairable *ratione tenuræ*. Id. s. 7.
(*d*) 6 Mod. 255, by Holt, C. J.
(*e*) By Buller, J. 5 Term Rep. 283.
(*f*) See 6 Mod. 307, The Queen v. Wilts Inhabitants.
(*g*) 5 Term Rep. 283.
(*h*) 2 Inst. 705. 1 Ro. Ab. 392.

tiff, and he was not to demand toll. The defendants, the owners of a house in the neighbourhood, took down the upper stones of the battlement at one end of the bridge, and carried them away, and subsequently built a wall with them. The plaintiff brought trespass. It was contended, that the action would not lie, since the bridge, when built, had been dedicated to the public, and the plaintiff had then no interest in it. But the court held, that the complaint being for taking away *materials* from the bridge, the fourth count, on the *asportavit*, was sufficient to entitle the plaintiff to a verdict against the defendants, who were wrong-doers; that those materials were dedicated by him to the public, for given purposes, and that, when those purposes could no longer be answered by their ceasing to be combined in that form, they returned again to the plaintiff as his absolute property (*a*).

III. Incidents.

We will just mention here some few incidents relating to bridges, before we proceed to inquire into the liability of repair, since the latter is an extensive subject, and deserves an entirely independent consideration.

Tolls of bridge not rateable.

First, the tolls of a bridge are not rateable *per se*. The lessee of certain tolls was assessed to the poors' rate in respect of them, but appealed against the rate, which was confirmed. When the case, however, came before the Court of King's Bench for their revision, they quashed the order, for it did not appear that the lessee was the occupier of any dwelling-house within the parish, nor that he was an inhabitant resident (*b*) within the parish, and deriving profit from the tolls beyond the rent he paid for the same, which was applicable to public purposes (*c*).

No ale-houses on bridges.

For the preventing of obstructions, which (to use the words of the act) frequently happen by the stopping of carriages on or near public bridges, it is provided that any collector of tolls at bridges for carriages, or cattle of any kind, who shall keep any victualling-house, ale-house, or other place of public entertainment, or shall sell, or permit the sale of any wine, beer, ale, cider, spirituous or other strong liquors, shall forfeit 5*l.* for each offence, upon conviction, before a justice of the limit, by the oath of a witness, or confession (*d*).

Damaging bridges, &c.

Annoyances committed by damaging bridges are punishable as we have mentioned in the chapter on obstruction, and to which the reader is referred (*e*). And the inhabitants of counties [and of hundreds, except as to future bridges, &c., by 54

(*a*) 6 East, 154, Harrison v. Parker.
(*b*) See 12 East, 330, Rex v. Nicholson, as to the tolls of a ferry.
(*c*) 12 East, 416, Rex v. Eyre.
(*d*) 13 G. 3. c. 78. s. 63.
(*e*) Ante, p. 45.

G. 3.] may sue for any damages done to bridges and other works maintained and repaired by such counties, &c., and for the recovery of any property belonging to such counties, &c., in the name of their surveyor; and may also be sued in his name. And no action or prosecution brought by or against them by virtue of the act shall abate or be discontinued by the death or removal of the surveyor, or by the act of the surveyor, without the consent of the justices assembled at the quarter-sessions, the surveyor in such actions to be deemed the plaintiff or defendant, as the case may be. But every such surveyor shall be reimbursed out of the monies in the hands of the treasurer of the public stock of the county for his costs, whether by reason of his being plaintiff or defendant in actions, or of his prosecuting indictments (*a*). An obstruction to the passage over a bridge must be removed, and cannot be dispensed with (*b*). The punishment for maliciously damaging a bridge is transportation for seven years (*c*).

IV. Of the repair of bridges.

In speaking of the repair of bridges, it will be found, that the county, city, or corporation, where they are situate, are respectively bound to repair, as a general principle. But we shall mention exceptions to this rule. The nature of the bridges to be repaired will also claim our attention, and the description of repairs which are requisite. This consideration will lead us to set out the provisions of the legislature for the obtaining of materials for such repair, for the contracting, on the part of magistrates, for that purpose, for providing against the emergency of sudden damage or decay, by raising a fund for temporary repair. And lastly, we shall disclose the mode of raising money for paying the expences of general repair. The amendment of private bridges will be then noticed, and the chapter will be concluded with a review of the different remedies which are available in case of non-repair.

Who to repair public bridges.

A county bridge, being for the common good and ease of all the inhabitants, ought to be repaired by the whole county (*d*), unless it be shewn that some other than the inhabitants ought to bear the obligation (*e*).

The county.

This was at common law, in affirmance of which the statute of Henry 8. was made. By that act, the justices of peace in every shire, franchise, city, or borough, or four of them, one to be of the quorum, are empowered to inquire of and determine, at their general sessions, all annoyances of bridges broken

(*a*) 43 G. 3. c. 59. s. 4. The act does not extend to bridges repairable by reason of tenure. Id. s. 7.
(*b*) Vaugh. 340.
(*c*) 8 G. 4. c. 30. s. 13.
(*d*) 10 E. 3. 28. 13 Rep. 33. Cro. Car. 366. 2 Inst. 701.
(*e*) Cro. Car. 365, Langforth Bridge case. 4 Vin. Ab. 282, S. C.

in the highways, and to make such process and pains upon every presentment before them, for reformation of the same, against such as should be charged to the amending such bridges, as they may see fit (*a*).

Upon this section Lord Coke observes, that if the franchise, city, or borough, be a county of itself, and have not four justices, &c., no other justices can, under the act in question, interfere; but the decay must be enquired of and remedied as at common law (*b*). And he says further, that the provision extends only to common bridges in the highways, and not to private bridges, to mills, &c. (*c*)

Who to repair.

The statute goes on to declare the persons who are liable. Thus, where it cannot be known what hundred, town, parish, or person, ought to repair, if they be not in a city or town corporate, the inhabitants of the shire or riding shall repair; and if part of the bridge happen to be in one shire, and the other part in another, or in some city, or town corporate, then the respective shires, cities, &c. shall repair within their several limits (*d*). This section again is declaratory of the common law, only it was new, that a hundred might be charged with such repair by prescription (*e*).

Inhabitants.

Who inhabitants within the statute.

One who has lands and tenements in his own possession in the county, &c. is an inhabitant within the act, according to Lord Coke, although he dwell in a foreign county, &c. So, if he keep a house and servants in the shire where the bridge is, although he dwell in another. So, again, every corporation and body politic residing in any county, or having lands and tenements there, are inhabitants. So, again, an infant having house or lands by descent or purchase. And the husband of a *feme covert* (*f*). Inhabitant is the largest word of the kind (*g*).

It has been held, that if a new district be added to a city, the inhabitants of the city generally must repair the bridges within such district, for all privileges of exemption are taken away by the words, "every inhabitant," used in a subsequent clause (*h*). And, therefore, where the inhabitants of a newly added liberty refused to contribute to the general rate, a mandamus was granted to the justices of that liberty for the purpose of compelling them to impose it (*i*).

(*a*) 22 H. 8. c. 5. s. 1.
(*b*) 2 Inst. 702.
(*c*) Id. 701.
(*d*) 22 H. 8. c. 5. ss. 2 and 3.
(*e*) By Powell, J. and Holt, C. J. 2 Lord Raym. 1251.
(*f*) 2 Inst. 703. See 6 Rep. 60.
(*g*) 2 Inst. 702. 4 B. & C. 778.
(*h*) 2 Lord Raym. 1249, the Queen v. St. Peter's Liberty in York Justices.
(*i*) Id. S. C.

City or body corporate.

It has been said, that corporations are rateable to the repair of bridges together with the county, where they have no bridge within their own limits (*a*) ; and in a case where a rate for the repair of a bridge in Worcestershire was resisted by the corporation of Evesham on the ground that corporations were exempted by the statute 22 H. 8. and taxable only by themselves, the court intimated an opinion, that they were rateable together with the county (*b*). There is this difference between corporate bodies and natural persons, that the former may be bound by usage and prescription only, being local, and having a perpetual succession, whereas the other cannot be bound by the act of his ancestor without a lien, or binding, and assets (*c*). Should a bridge be partly within a franchise, and partly within a guildable, so much as may be within the franchise shall be repaired by the inhabitants thereof, and so *mutatis mutandis* (*d*).

What bridges.

All *public* bridges within the county or city are to be amended according to this rule. Therefore, where the bridge indicted was a horse-bridge, not wide enough for a cart or other carriage to pass over it, the court considered, that it was repairable by the county, and that all public bridges were *primâ facie* so repairable, without distinction of foot, horse, or carriage bridges (*e*).

Queen Anne built a bridge at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry, with a toll, which belonged to the crown, and until 1796 the crown had repaired the bridge. Being then in a ruinous condition, it was taken down, and the materials were converted to the king's use. The county of Bucks was indicted in 1809 for the non-repair of this bridge, and found guilty. It was held by the court, that this was a public bridge in a principal highway, and that the county were bound to repair it (*f*). So, where the inhabitants of Glusburne had built a bridge for carts, &c. and, subsequently, pulled down the ancient *foot bridge*, and sold the materials, they were indicted, and found guilty, and the court sustained the verdict (*g*). Even where townships had enlarged a bridge from a *foot* to a *carriage* bridge, the West Riding of Yorkshire was held liable to do repairs to this carriage bridge, although the township still remained answerable *pro ratâ* (*h*).

(*a*) 1 Keb. 687, Borough of Shastaw. 1 Hawk. c. 77. s. 19.
(*b*) Skin. 254, County of Worcester and Town of Evesholm.
(*c*) 2 Inst. 700.
(*d*) Id. 701. 13 Rep. 33.
(*e*) 13 East, 95, Rex v. Salop Inhabitants.
(*f*) 12 East, 192, Rex v. Bucks Inhabitants.
(*g*) 5 Burr. 2594, Rex v. West Riding Inhabitants. 2 Sir Wm. Bl. 685, S. C. See 2 East, 352, Rex v. Lancashire Inhabitants cited there.
(*h*) 2 East, 353, n. Rex v. West Riding Inhabitants. 2 Campb. 455, S. P. Rex v. Surrey Inhabitants.

New bridges.

These decisions lead us to the consideration of the repair of newly built bridges, on places where no one was before erected. And these also must be maintained by the county, city, or town corporate, if they be of public utility. The question in these cases is, whether the bridge be a general benefit. Thus, if a private person build, and the bridge be useful to the public, the county becomes bound to the repair of it (*a*).

So, where the trustees of a turnpike built a bridge, which was of general use, and no fund was specially provided by the legislature for its maintenance, the burden necessarily attached on the county (*b*), and even if a fund had been provided, according to the rule laid down in the case of highways, it would only have been auxiliary, and the original liability would have remained (*c*). Indeed, there is an express authority to this effect, on the subject of bridges. Certain trustees were empowered by act of parliament to make and repair bridges, and were directed to lay out tolls for the reparation of the roads. They built a bridge, and for the non-repair of it the county were indicted. The plea was, that the trustees ought to bear the burden, but it did not aver that they had funds sufficient for that purpose. If it had so averred, however, the court considered that the case would not have been different: they said it was a necessary allegation, but not a valid defence, since, upon the general principle, the county was liable, although an auxiliary supply might exist applicable towards the repair of the bridge (*d*).

A miller erected a bridge across the river Cray, for the convenience of his mill. He thereby deepened the ford there, and rendered the original highway impassable. The county were indicted for not repairing this bridge, the public having used it for nearly fifty years (the time elapsed since its construction); but they said that this allegation to repair lay on the miller. The court however decided against the county, on the principle above quoted from Salkeld, that a bridge built by a private person, which afterwards becomes of public convenience, must be repaired by the county, and in this case the public were undoubtedly benefited by the making of a safe passage over the ford (*e*).

The principle deducible from the above authorities has been

(*a*) 1 Salk. 359. Holt, 340. 6 Mod. 307. See 6 Mod. 151, n. Lofft. 238. 2 Campb. 457, by Lord Ellenborough. 1 Bac. Ab. 330.

(*b*) 2 East, 342, Rex v. West Riding Inhabitants. Id. 356, Rex v. Glamorganshire Inhabitants. S. P. 14 East, 477, Rex v. Devon Inhabitants.

(*c*) 2 B. & A. 179.

(*d*) 4 B. & C. 194, Rex v. Oxfordshire Inhabitants.

(*e*) 2 M. & S. 513, Rex v. Kent Inhabitants. See also the Stratford Bridge case in the note, cited Id. 520. S. C. as that cited by Lord Rolle, 1 Ro. Ab. 368. And see the observations of Lord Ellenborough, 2 M. & S. 519.

too clearly illustrated to require further discussion. There are, nevertheless, exceptions to the general rule.

Exceptions to the general rule, that counties, cities, &c. must repair bridges.

It was proved from the last case, that the merely erecting of a bridge for private convenience, would not *necessarily* entail upon the builder or proprietor the charge of keeping it up. This rule is subject to some qualification. The Medway Navigation Company were empowered under a local act to make the river navigable, and to amend or alter such bridges or highways as might hinder the navigation, *leaving* them or others as convenient in their room, &c. This was not only a *condition* to keep up any bridge which the company might build, but it was also a *continuing condition*, and, therefore, where the county were indicted for not repairing a bridge erected under these circumstances, a verdict was entered for the defendants (*a*). So, in another case of a similar nature, it appeared, in addition to other powers, that a company were authorized to discontinue any works, and, amongst others, any *bridge*. Here a verdict was again entered for the defendants, (the county,) for the inhabitants of a county can never have by law a permanent burthen thrown upon them to repair a bridge, of which they had not the permanent use and enjoyment secured to them (*b*).

So, where commissioners were empowered by act of parliament, amongst other things, to cut the soil of a highway for the purpose of making a new channel, &c. upon which they cut through a highway, rendering it impassable, and built a bridge over the cut, it was held, that they, and not the county, were bound to repair, for the county could derive no benefit from passing over a bridge, instead of the solid highway, as it originally was, and the case was distinguished from Rex v. Kent (*c*), where the county derived a very essential benefit from the bridge (*d*).

It follows from hence, that when the county are able to throw the burthen of repair upon others, they are at liberty to do so. This has been done in many other instances than the foregoing. Thus, evidence may be given, that a bridge has been repaired by private individuals, although, unsupported by other proof, it will not much avail the county (*e*). No particular man, however, is bound to repair by the common law, unless it be by reason of tenure, or by prescription. Therefore, either of these obligations will relieve the county (*f*). And so, if an abbot and his predecessors have time out of mind repaired a bridge of alms, they shall be

(*a*) 13 East, 220, Rex v. Kent Inhabitants.
(*b*) 14 East, 318, Rex v. Lindsey Inhabitants.
(*c*) 2 M. & S. 513. Ante, p. 202.
(*d*) 3 M. & S. 526, Rex v. Kerrison.
(*e*) 2 M. & S. 262, Rex v. Northamptonshire Inhabitants.
(*f*) 13 Rep. 33. 2 Inst. 700. 8 H. 7. 5.

compelled to repair it (*a*). For the abbot and convent may bind their successors (*b*).

The lord of the manor of *M.* was indicted for not repairing a bridge. It was said by Holt, C. J., that this charge would not lie upon him as lord of the manor, but that there must be some charge upon the manor, as holding it by the service of repairing the bridge, which is *ratione tenuræ*, or there must be a prescriptive liability, and judgment was arrested for want of allegations to this effect (*c*). So, an indictment charging the defendant by reason of his being the owner and proprietor of a certain navigation, was held not to shew a consideration, as though it had charged him *ratione tenuræ*, for these latter words embody the condition upon which land is granted; the former do not (*d*). And thus it appears that a *special consideration* must be shewn, where the county seek to establish a case of repair against other persons. The description of the parties bound to repair must be set out with certainty (*e*). An indictment stated that an ancient bridge was out of repair, and that the *inhabitants* of the parish of *P.* and town of *M.*, by reason *of the tenure of certain lands*, had repaired bridges from time immemorial in the parishes of *P.* and *M.* But this form of pleading was holden bad, for the parishes were not alleged to be within the town, and then there would not be any liability, because no special consideration was shewn; and next, inhabitants, as such, cannot hold lands (*f*).

The express provisions of an act of parliament will, of course, discharge the county. Trustees were appointed by statute for taking down an old, and erecting a new bridge, and they were empowered to take tolls during the continuance of the act. The property of the bridges, old and new, was vested in the trustees, and as soon as the purposes of the act were completed, the tolls were to cease, and the bridge was to be repaired by such as would by law have been liable to amend the old bridge. Whilst the trustees were employed in executing the act, a justice of the peace presented the bridge upon his own view. It was held, that the *county* was not liable, nor would be until the act had been fulfilled, for the trustees might undo any repairs made by the county, and, in fact, the original liability was suspended till the bridge should be rebuilt (*g*).

If a parish have repaired from time immemorial, the county

(*a*) 10 E. 3. 28.
(*b*) 44 E. 3. 31. Bro. Nu. pl. 5. cites S. C. 13 Rep. 33.
(*c*) 7 Mod. 55, the Queen v. Bucknell. Holt, 128, S. C. 2 Lord Raym. 792. 804, S. C. S. P. Latch. 206. Noy. Rep. 93. Sty. 400.
(*d*) 1 M. & S. 435, Rex v. Kerrison.
(*e*) 2 Lev. 112, Rex v. Nottinghamshire Inhabitants.
(*f*) 2 B. & C. 166, Rex v. Machynlleth and Pennegoes Inhabitants. 3 D. & R. 388, S. C.
(*g*) 16 East, 305, Rex v. Somersetshire Inhabitants.

will be discharged. The evidence to support this allegation would be, that the parish have been fined for non-repairing, and that they have acquiesced under the charge for many years (*a*).

We have seen, that the county are compellable to repair to the extent of three hundred feet of the highway at each end of a bridge. This is so, although one end be in another county. If a new bridge, however, be built within three hundred feet of an old bridge, and in another county, it is repairable, nevertheless, by the inhabitants of the last-mentioned county. The inhabitants of Dorsetshire were accustomed, according to the provisions of the act, to maintain three hundred feet of road on the Devonshire side of a bridge which stood in Dorset. At about one hundred and fifty feet from the bridge there was a ford, and a private individual at length built a smaller bridge over this, which having been generally used by the public, was considered, in consequence, to be repairable by the county of Devon. Upon an indictment against the latter county, they said, that this second bridge was an appendage to the other, and like that, repairable by Dorset. But the court held it to be a substantive bridge in Devon, and repairable by that county (*b*) *.

Division of lands.

The alienation of part of the lands liable to repair a bridge will not avail a defendant, if he be at all responsible. So that where Loddon Bridge was out of repair, and one who had purchased a great part of the manor where it was situate, was indicted, it was held not to be any excuse for him to say, that others had purchased part of the lands, and ought to contribute, for the court might force the repair upon him alone. And this upon the principle that the public ought not to suffer while private disputes should be discussed and determined (*c*). It was held in another case, that all those who had any part of the demesne lands of a manor chargeable with the repair of a bridge, were liable, and that neither the ancient freehold tenants, nor enfranchised copyholders, should contribute, for, as to the latter, their enfranchisement only alters the manner of their tenure (*d*). But if a man hold one hundred acres, and ought to repair a bridge by reason of his tenure, and he alien twenty acres in fee to me, and twenty acres to another, and one of these only be distrained for repair upon presentment found, he shall have a special writ to the king's officers, that they do not distrain him otherwise than according to his proportion of land (*e*). A

(*a*) 8 Mod. 119, Rex v. Surrey Inhabitants.

(*b*) 14 East, 477, Rex v. Devon Inhabitants.

* As Mr. Byng has obtained leave to bring in a bill for altering the law as to the repair of these 300 feet by the county, the reader will be kind enough to examine whether any new measure shall have been adopted by the legislature.

(*c*) Sir Wm. Jones, Rep. 273, Case de Loddon Bridge.

(*d*) Hardr. 131, Rich v. Barker. S. P. 1 Salk. 358, the Queen v. Duchess of Bucklugh. 2 Lord Raym. 792, the Queen v. Bucknall.

(*e*) F. N. B. 235. (B.) See ante, p. 92, where the legislative provision for

county was indicted for non-repair. They pleaded that another person ought to repair by reason of tenure. It appeared that the estate of the party sought to be charged was part of a larger estate which he had purchased of the owner, who retained the rest, and who had repaired the bridge before and after the purchase. It was held, that this plea was not good, because a third person had repaired; but the court stayed the judgment, as another indictment should be preferred to try the liability (*a*).

What repairs.

The Abbot of Combe was presented for not repairing a bridge, and he said, that he had at another time traversed such a presentment, when it was found, that he should repair but two arches in the middle, but, by Knivet, it is no bridge without the residue, and if the defendant can say no more, he must make the *whole*, for he may do so without the licence of those who have the land adjoining (*b*).

Bridges need not be widened at common law.

Notwithstanding a strong intimation by Lord Kenyon, that the burden of widening a bridge must be borne by those who are bound to repair it (*c*), it is now settled, that such is not the law. The inhabitants of Devonshire were indicted for the non-repair of Dart Bridge, and it was contended, that they were bound to widen as well as repair it, whenever public convenience might require such an improvement. But the court gave judgment for the defendants, overruling the *dictum* of Lord Kenyon above cited (*d*). And by Abbott, Chief Justice, "If we should lay down the law to be, that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to see why we should not be called upon to say, that the inhabitants of a parish are bound to widen a public highway; and the inconvenience arising from such a rule is obvious." (*e*) But the court of quarter sessions have power given them by the legislature to direct the widening of bridges. For, when any bridge, or road at the end, repaired at the expense of a county*, shall be

They may under 43 G. 3.

compelling reimbursement in the case of highways, *pro ratâ*, and which extends to bridges, is mentioned. One was indicted for the non-repair of a house near a bridge, which was so ruinous as to be ready to fall upon the Queen's subjects passing by. He was tenant at will. It was held, that he should repair, so that the public might not be prejudiced, but not as it regarded his landlord. 2 Lord Raym. 856, the Queen v. Watson.

(*a*) 16 East, 223, Rex v. Oxfordshire Inhabitants.

(*b*) 43 Ass. pl. 37. Bro. Presentments in Courts, pl. 22, cites S. C. And the law gives power to him who ought to repair a bridge, to enter into the land for that purpose. 11 Rep. 52.

(*c*) 6 Term Rep. 194. Lord Eldon, however, expressed great doubts of this position, when the case came before the House of Lords on a writ of error. It was decided on another point. 3 B. & P. 354, 360.

(*d*) 4 B. & C. 670, Rex v. Devon Inhabitants. S. P. Rex v. Lincoln Inhabitants. Id. 676, mentioned in the note.

(*e*) 4 B. & C. 677.

* Extended to bridges and the roads at the end repaired by the inhabitants of hundreds, and other general divisions in the nature of hundreds by 54 G. 3. c. 90. s. 2, except as to bridges thereafter to be erected.

narrow and incommodious, the justices, at their general quarter sessions, may order such bridge, &c., to be widened, improved, and made commodious. If the bridge be in such decay as to render the taking it down necessary or expedient, the justices may, in like manner, order that it may be rebuilt, either on the old site, or elsewhere more convenient to the public, contiguous to or within two hundred yards of the old one. If it be necessary for this purpose to purchase ground, [or buildings, or other erections (*a*),] the county surveyor shall set out and ascertain the same under the direction of the justices, at their sessions as aforesaid, provided such ground do not exceed one acre at any one such bridge. The surveyor, moreover, may contract and agree with the owner, and persons interested for the purchase, either by a sum in gross, or by an annual rent, at the option of the owner, and if the surveyor cannot agree for the purchase or recompence, or be prevented from treating by reason of the owner not being found, the justices at sessions may impannel a jury, and assess the composition and satisfaction for the land, and for the trespass and damage to be done, in the same manner as in the case of highways, under 13 G. 3. (*b*), which act, as it regards the impannelling of juries, examining and swearing witnesses, payment of expenses, enabling bodies politic, &c., to sell and convey, shall extend to the present. Provided, that no money be applied to the amendment or alteration of any such bridge until presentment made of the insufficiency, inconvenience, or want of reparation, in pursuance of some statute in force concerning public bridges (*c*). The act does not extend to bridges repairable *ratione tenuræ* (*d*).

The justices of Dorset having contracted for building a new bridge on a different site from that of the old, ordered the old bridge to be taken down before the new was passable, in order that the contractor might use the old materials, upon which, the Court of King's Bench was moved for a writ of prohibition by reason of the public inconvenience resulting from such a proceeding. But the motion was refused, for there was another remedy open by indictment, and, besides, the justices might have ordered the rebuilding on the old site, and then the public must have suffered a temporary inconvenience (*e*).

Having stated that the county, or city, &c., ought to repair in the first instance, together with the exceptions to that general rule, having also set out the nature of the repairs to be done, and

(*a*) The 54 G. 3. c. 90. s. 1, introduced these words, there having been doubts whether the other act extended to buildings.
(*b*) Ante, p. 117.
(*c*) 43 G. 3. c. 59. s. 2.
(*d*) Id. s. 7.
(*e*) 15 East, 594, Rex v. Dorset Justices.

the extent of the liability, and just reverting for an instant to that part of the clause of the statute 22 H. 8., which speaks of a bridge in two counties, ordering, that each shire shall repair according to the several limits (*a*), we proceed to mention those provisions of the legislature which afford the means of providing sufficient materials for repair in these cases.

Thus, the surveyor of bridges and other public works, in every county, appointed at the general quarter sessions, may search for and take gravel, stone, sand, and other materials, for the repair of such bridges and roads at the end, as the inhabitants of counties are bound to repair, [and of hundreds, &c., by 54 G. 3.—as before,] and remove obstructions, &c., from such bridges, &c., as the surveyor may do under the Highway Act, 13 G. 3. The powers and authorities of that act are vested in the surveyor, and the penalties and forfeitures given thereby are extended to the act before us in as full a manner as though they had been re-enacted (*b*). Further, the property of all tools, implements, timber, bricks, stones, &c., purchased by the order of justices by the surveyor, are declared to be vested in the surveyor, and may be laid in him upon the commencement or prosecution of any action or indictment (*c*). Further powers are given by a subsequent statute, which extends to hundreds as well as counties. Every surveyor of bridges appointed at sessions as above, and every bridgemaster *, or person, who at, or after, the passing of the act may be under contract to rebuild or repair any public bridge, built, &c., at the expense of the county, hundred, or general division, may, with the consent and order of two justices acting for the county where the bridge is intended to be rebuilt or repaired, search for, work, dig, get, and carry away any stones from quarries within the county, without the owner's leave, making satisfaction for the value of it, and also for the damage done, as shall be agreed on with the owner, occupier, or other person interested. Quarries within a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation, or such as may now or hereafter have ornamented timber trees growing thereon, are excepted out of this licence, and the quarry must have been worked within three years preceding the time when the bridge is about to be rebuilt or repaired. If the parties cannot agree, or the owner, &c., refuse

(*a*) See Tho. Raym. 384.
(*b*) 43 G. 3. c. 59. s. 1.
(*c*) Id. s. 3.

* [Bridge-master.] The sessions ordered that the bridge-master should pay a *per centage* on all money raised for the repair of bridges in a certain hundred, in lieu of all his fees for indictments, &c. for bridges within it. The Court of King's Bench held this to be improper, and quashed the order, although the fee appeared to be an ancient payment, and had been long acquiesced in. 1 B. & A. 312, Rex v. Houldgrave.

to treat, the justices, at their general, or quarter sessions, or any two appointed for that purpose, shall cause the value of the stones and the amount of damage to be ascertained by a jury of indifferent men of the county, &c., where the same may be situate, (fourteen days' notice being first given to the owner, or his agent, of the intention to require a jury.) The justices may then summon before them and examine any person on oath, which they are empowered to administer, and by ordering a view, or otherwise, shall use all ways and means for the information of themselves and the jury. The value, &c., being ascertained; the justices shall order the sum estimated to be paid; the verdict or inquisition, and order, is to be filed of record by the clerk of the peace, or other officer, having the custody of records in the county, &c., and to be final and conclusive to all persons whatsoever, in possession, reversion, &c., and whether under disabilities or not (*a*).

For the summoning and returning of these juries, the justices or any two of them may issue a warrant to the sheriff or bailiff of the county, &c., where the quarry is situate, requiring him to impanel, summon, and return an indifferent jury of twenty-four persons, qualified to serve on juries, to appear before such justices, or any two of them, at the time and place specified in the warrant, and then the justices shall draw twelve by ballot, and cause them to be sworn, out of such as have been impanelled, &c., or appear upon summons, and these shall be the jury. But in default of a sufficient number of persons returned, the sheriff may take such other honest or indifferent men of the by-standers, or who can be speedily procured, to make up the number of twelve. All persons concerned to have their lawful challenges. The justices, moreover, may inflict a fine of not more than 10*l.*, nor less than 20*s.*, on the sheriff, or bailiff, or their respective deputies, making default, or on any person returned and summoned on the jury who may not appear, or who, appearing, may refuse to be sworn, or, being sworn, may refuse to give, or may not give, a verdict, or may in any other manner neglect his duty therein, or on any person who being summoned or required to give evidence, may refuse or neglect to appear, or, appearing, may refuse to be sworn or give evidence (*b*). And as to the expenses of the jury, if they shall deliver a verdict for more money than the surveyor shall have offered as the value of the stones, and amount of the damage, the costs and expenses of summoning and maintaining the jury and witnesses shall be paid out of the county rate, but if there be a verdict for less, then such costs, &c., shall be borne by the person with whom the dispute as to value shall have arisen, and shall be levied by warrant of one of the said

(*a*) 55 G. 3. c. 143. s. 1. That these materials are exempted from toll, see ante, p. 165.

(*b*) 55 G. 3. c. 143. s. 2.

justices, by distress and sale of the goods of that person (*a*). An appeal is given by the next section. For if any person should think himself aggrieved by any thing done in pursuance of the act, he may appeal within three calendar months to the quarter sessions for the limit where the cause of complaint may have arisen, giving fourteen days' notice in writing of such his intention, and of the cause or matter of appeal, to the person against whom the complaint shall be made. He must enter into a recognizance before a justice of the county, &c., within three weeks after such notice, with two sureties, conditioned to try the appeal, abide by the order of, and pay the costs awarded by the justices, and the justices of sessions shall determine the matter in a summary way (*b*).

Justices may contract for the repair of bridges.

If any public bridges, ramparts, banks, or cops, or other works, are to be repaired at the expense of the county, city, riding, &c., the justices may contract with any person at their general or quarter sessions, for rebuilding, repairing and amending the same for a term not exceeding seven years at a certain annual sum, after presentment made by the grand jury *. They were to give public notice at the sessions †. Such contracts are to be made at the most reasonable price to be agreed for, and sufficient security for performance is to be given to the clerk of the peace, or town clerk, or chief officer of the county, &c. All contracts when agreed to, and all orders relating to them are to be entered in a book kept by the clerk of the peace amongst the records of the county, and to be inspected by the justices, within their limits, at all seasonable times, and by any person employed by any parish or place, contributing thereto, without fee (*c*). Another statute ordained, that the justices of any county, city, &c., might, at their general or quarter sessions, or the major part of them, contract with the commissioners or trustees of any turnpike road within such county, &c., or with their surveyor or clerk, or with both, or with the surveyor of any highway within the parish, &c., in such county, &c., or with any other person, for the maintaining and keeping in repair *roads* over any county bridges, and roads at the end thereof to be repaired by the county, &c., for any term not exceeding seven years, nor less than one, although no presentment shall have been made or directed by 12 G. II., subject, however, to all the rules of 12 G. II., in case the same should be presented as directed by that act (*d*).

(*a*) 55 G. 3. c. 143. s. 3.
(*b*) Id. s. 4.
* This presentment is dispensed with by subsequent acts of parliament.
† This also is unnecessary, see post, 211.
(*c*) 12 G. 2. c. 29. s. 14.
(*d*) 52 G. 3. c. 110. s. 5.

And by the last section of 55 G. III., c. 143., the justices of any county, city, riding, division, town corporate or liberty, may contract and agree at their general quarter sessions, or authorize any other person so to contract, &c., for the maintenance and keeping in repair of any county or hundred bridge, *and* * the road there over, and so much of the roads at the ends as are by law liable to be repaired at the expense of any such county, hundred, city, riding, division, town corporate or liberty, or any part thereof. The justices are further empowered to order the sum agreed for to be paid for repairing, &c., such bridges, and the roads, &c., to be paid (where the county is liable) by the treasurer of the county out of the county rate, or (where the hundred is liable) by the bridge-master (or other public officer charged with the repair of bridges) of the hundred by which such bridge is liable to be repaired, for any term not exceeding seven years, nor less than one, although no presentment of the insufficiency, decay, &c., have been made, and although no public notice shall have been given by the justices at their respective general or quarter sessions, of their intention to contract, as directed by 12 G. II. Provided that such justices shall cause notice to be given in some public newspaper circulated in such county, &c., of their intention before the contract is entered into (*a*).

Persons appointed to see that bridges are repaired.

Surveyors were appointed as early as the reign of H. VIII., for the purpose of attending to the reparation of bridges. For the justices, or four of them were empowered to name two surveyors, who were to see every decayed bridge amended or repaired from time to time, and it was ordained that the money spent for this purpose should be paid to them by collectors appointed by the same justices (*b*). An allowance was to be made to these surveyors for their trouble at the discretion of the justices (*c*). †

And further, the justices of any county, city, &c., may, at their general or great sessions, to be holden in the week next after the close of Easter, or the major part may appoint annually two or more justices acting in and for any division of justices in

* The other act only mentioned *roads* over bridges.

(*a*) 55 G. 3. c. 143. s. 5.

(*b*) 22 H. 8. c. 5. s. 4.

(*c*) Id. s. 8.

† If a surveyor make an estimate which turns out to be considerably incorrect, through his negligence in not examining the ground for the foundation of the work, he cannot recover any thing for his plans, specifications, or estimates. And if he be a shareholder, he cannot sue, on the ground of his being a partner, *although he subscribe as architect and engineer.* 1 C. & P. 352. Moneypenny v. Hartland, 2 C. & P. 378, S. C. And see Holmes v. Higgins, 2 D. & R. 196. The surveyor must have recourse to equity.

such county, &c., in or near which any county bridge, or any bridge which is in part a county bridge, rampart, &c., shall be situate, to superintend the same. Whenever it shall appear to these two or more justices on their own inspection to be necessary for the preventing of the decay of such bridges, &c., that any immediate repair should be done, they are authorized to order such repairs. Such an order is to be made by writing under their hands. But the sum so to be expended must not exceed 20*l.* The two justices are to remain in office for one year, that is to say, until one week after Easter, and if any such justice die, or be removed, or refuse to act, the general quarter or great sessions may appoint another justice to act for the remainder of the current year, at any other of the four quarterly sessions (*a*). A subsequent section enables justices at sessions to make this appointment before the Easter sessions: such appointment to be in force until one week after the next Easter sessions (*b*). The provisions of the act are fully extended to such latter appointments (*c*). The mode of payment for these last-mentioned repairs is as follows: The justices, at their general quarter or great sessions next after the happening of such repairs, or the major part, may order the payment of any sum not exceeding 10*l.*, out of the county rates, although no presentment shall have been made by any grand jury at the assizes, great sessions, or quarter sessions. But there must be a certificate, signed by two at least of the inspecting justices, stating the nature of the repairs, and the defects, &c. which they shall have ordered to be repaired, together with their reasons for such direction, which certificate shall be returned to the justices assembled at the sessions. The justices must, moreover, be satisfied, by the parties concerned, that the charges made are reasonable and just (*d*).

With regard to the presentment for insufficiency, it is observable, that, according to the general rule, and in pursuance of the general law presented by the statutes, it is necessary; but that there are these exceptions:—1st, Where bridges, or the roads over them, or at the ends of them, are to be repaired by contract; and next, where repairs are to be done to the amount of 20*l.*, under the superintendence of two or more justices, as we have above related.

It was enacted by the turnpike act of 1822, that compositions might be entered into by counties for repairing bridges on turnpike roads, which were repairable by parishes, and the like compositions between trustees of turnpike roads and parishes for a

(*a*) 52 G. 3. c. 110. s. 1.
(*b*) Id. s. 3.
(*c*) Id. s. 4.
(*d*) Id. s. 2.

similar purpose (*a*). But by a recent act it is declared, that where any part of a turnpike road, or any bridges, arches, drains, or sewers, lying on such road, ought to be repaired by any particular person, body politic or corporate, by reason of tenure, or otherwise, or by any county, or any parish, or where any composition has been entered into or made in lieu thereof, such road and bridges, &c. shall be repaired by such person, &c., or such composition shall be paid in such manner, as the same were respectively maintained and kept in repair, or paid before the passing of the act of 1822 and 1823, or by any local turnpike act (*b*). After many provisions upon the subject, it was at length ordained by the legislature, that the money disbursed for the repair of public bridges should be paid out of the county rate. And, accordingly, the justices were empowered, at their general or quarter sessions, to make, from time to time, one general rate or assessment for such sum as they should think sufficient to answer the ends of the recited acts, [amongst which were those for the repair of bridges,] instead of the several, separate, and distinct rates thereby directed to be collected. Such rates so made are to be assessed upon every town, parish, or place, within the respective limits of the commissions of the justices, in such proportions as the rates have been before levied; and to be collected by the high constable of the several hundreds and divisions (*c*).

Where a fine was imposed upon a county, which the sessions thought illegal, the Court of King's Bench confirmed their order, which directed that the expenses of litigation should be defrayed out of the county rate (*d*); and although the matter in question respected the county gaol, it was said that the case of bridges could not be distinguished from it (*e*).

The mode of collecting money for the repair of bridges, therefore, is governed by the regulations in general on the subject of the county rate.

It was held, in an old case, that the justices of a particular district in a city could not make a rate for repairing a public bridge, but that the justices at large were bound to join in making such an assessment (*f*).

Private bridges.

With regard to the repair of private bridges, the obligation

(*a*) 3 G. 4. c. 126. s. 107 and 108.
(*b*) 7 & 8 G. 4. c. 24. s. 17.
(*c*) 12 G. 2. c. 29. s. 1.
(*d*) 4 Term Rep. 591, Rex v. Essex Inhabitants.
(*e*) By Buller, J. 4 Term Rep. 595.
(*f*) 2 Lord Raym. 1249, the Queen v. St. Peter's Justices in York.

must be borne by those who permit the easement, on the same principle as in the case of highways.

This rule, however, is liable to be rebutted in like manner by evidence that the persons have immemorially performed the amendments required, or are bound by covenant or agreement to do so.

Remedies for compelling the repair of bridges.

The ordinary remedy for a neglect to repair public bridges is by presentment or indictment. It was early observed, that an assise of nuisance would not lie for the laches or omission to repair a bridge; and a distinction was taken between a neglect to do this repair, and a wilful damage or obstruction, in which latter case an assise was allowable (*a*).

And further, no action on the case can be maintained in this instance, for the fault of non-repair is an injury to all the king's subjects, and so punishable only by presentment and fine (*b*). An attempt, however, was made in modern times to charge a county in that form of action; and the plaintiffs' complaint was, that in consequence of a bridge being out of repair, their waggon received an injury. The declaration was demurred to, and Lord Kenyon observed, that if the experiment had succeeded, it would have been productive of an infinity of actions. The court also recognized the case in Brooke's Abridgment, where it is said, that no action lies, if a highway be out of repair, so that a horse be mired (*c*); and judgment was given for the defendants (*d*).

Presentment.

This presentment might be, at the common law, before the King's Bench, or justices in Eyre, or commissioners of *oyer* and *terminer* (*e*). The non-repair may also be presented in the tourn or leet (*f*). And by the old statute of H. VIII., above quoted, if the bridge be in one shire, and the persons or lands to be charged in another; or if it be in a city, or town corporate, and the persons or lands are out of the city or town, the justices of such shire, city, or town, are authorized to hear and determine any annoyances, if within the limits of their commissions. And if the annoyance be presented, they may then make process into every shire of the realm against such as ought to repair, and do further in every behalf as they might do if the persons or lands chargeable were in the same shire, &c. where the annoyance is (*g*).

The only matter necessary to be presented is, that the bridge

(*a*) 11 H. 4. 83.
(*b*) Vaugh. 340.
(*c*) Bro Action sur le case, pl. 93.
(*d*) 2 Term Rep. 667, Russell v. the Men of Devon. See ante, p. 53.
(*e*) 2 Inst. 701.
(*f*) Ibid.
(*g*) 22 H. 8. c. 5. s. 5.

in question is a public bridge, and out of repair, which must be shewn in the order. However, when it is doubtful who ought to repair, the advice given in 2 Inst. (*a*) is said to be very good, that an inquiry ought to be made by the grand jury (*b*).

No certiorari.

The *certiorari* is taken away from the defendant, but not from the prosecutor. Thus, all matters concerning repairing such bridges and highways,—that is, highways at the ends of bridges,—shall be determined in the county, and not removed by *certiorari* (*c*). It is worthy of observation, that this section applies only to the repair of *county* bridges; and, therefore, where a parish, or private person is charged, it survives, according to the provision of 5 and 6 W. and M., c. 11. s. 6, which enacted, that where the title to repair should come in question, a *certiorari* might issue upon a suggestion, and affidavit to that effect, so as that the parties prosecuting the *certiorari* should find two manucaptors to be bound in a recognizance, conditional to try at the next assizes (*d*).

We said, that the *certiorari* was not taken away from the prosecutor, and this point has been decided on more than one occasion. Thus, where the whole county of Wilts was concerned in the repair of a bridge, the Attorney-General moved for a *venire* to Berks, and his motion was granted as a matter of right on his part (*e*). And in a more recent case, which subsequently went up to the House of Lords from the Court of King's Bench, the same point was established (*f*). It is said, that a *certiorari* lies to remove an order made by the justices concerning the repair of a bridge, pursuant to a private act of parliament, and that the justices ought to retain the private act upon which the order is founded (*g*). Where bridges are repairable by parishes, we have seen, that the Highway Act takes away the *certiorari*, except in cases where the right of repair may happen to come in question, and the exception also as to the prosecutor has been mentioned, together with the authorities upon the subject, in a former chapter (*h*).

Fine.

It is enacted, that no fine for not repairing bridges, and the highways at the end of them, shall be returned into the Exchequer, but that they shall be paid to the treasurer of the county, and applied by the justices towards the building or repairing of

(*a*) 2 Inst. 703.
(*b*) Andr. 101, 285, Rex v. Middlesex Inhabitants. See F. N. B. 127. (E.)
(*c*) 1 Ann. stat. 1. c. 18. s. 5.
(*d*) 2 Str. 900, Rex v. Hamworth Inhabitants.
(*e*) 6 Mod. 191, 307, the Queen v. Wilts Inhabitants. 1 Salk. 146, case of Cardiffe Bridge. 1 Lord Raym. 580, S. C. See also 1 Str. 177, 180, 183.
(*f*) 6 Term Rep. 194, Rex v. Cumberland Inhabitants. 3 B. & P. 354, S. C. in error.
(*g*) Burn's Justice, ed. 1820, Vol. I. p. 380.
(*h*) Ch. VI. p. 88, and see also Ch. VII. p. 187.

such bridges, &c. (*a*). One fine only can be imposed for the non-repair of a bridge. The Montgomeryshire sessions imposed a fine of 300*l.* upon the township of Machynlleth and parish of Penegoes, for non-repair, and, that fine not being sufficient, they made an order increasing the fine "by the sum of 200*l.*" A *certiorari* was obtained for the purpose of quashing this last order, and the Court of King's Bench considering that the power of the sessions was at an end after the first fine, and that they had no jurisdiction to impose a second, quashed the order (*b*). There might be writs of *distringas* until the bridge should be repaired, or a new indictment might be preferred, and a fresh fine imposed (*c*).

Covenant for not rebuilding a bridge.

It has been determined, that an action of covenant may be maintained against a person who agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time, although it was broken down during that time by an extraordinary flood (*d*).

Penalties.

General issue.

With respect to penalties, the statute of Anne directs, that all penalties under the act should be applied to the repair of bridges and the highways at the end of them (*e*). Further, such as act under the authority of that statute may plead the general issue, and give the act, together with the 22 H. VIII. c. 6., in evidence, and if judgment be for them, shall have double costs (*f*).

Upon a question between a county and a parish as to the liability of repairing a bridge, the court refused to compel the inhabitants of the parish to allow the county to inspect the parish books and documents respecting the repair of the bridge (*g*).

Remedies in case of the non-repair of private bridges.

The old remedy for the non-repair of a private bridge was the old writ *de ponte reparando*. Thus, if one had a passage over a bridge, and the person who ought to have repaired made default, a writ might have been obtained against him (*h*). So, if the bridge led to a mill, being a private bridge, which *A.* ought to have maintained, and over which *B.* had a passage, the latter might have had his writ *de ponte reparando* (*i*). And now, at

(*a*) 1 Ann. stat. 1. c. 18. s. 4.

(*b*) 4 B. & A. 469, Rex v. Machynlleth and Penegoes Inhabitants, and see ante, p. 91.

(*c*) See 4 B. & A. 470, n. Rex v. Old Malton, cited there. So, if for doing a thing prohibited by statute, the party offending have been fined to the king in an action brought by the party, as for not repairing a common street of a town, &c. it seems, that he shall not be afterwards punished by indictment, for then he would be fined twice for the same offence. 2 Hawk. 210. s. 4.

(*d*) 6 T. R. 750, Brecknock and Abergavenny Canal Navigation v. Pritchard.

(*e*) 1 Ann. stat. 1. c. 18. s. 9.

(*f*) Id. s. 7.

(*g*) 8 B. & C. 375, Rex v. Buckinghamshire Justices.

(*h*) F. N. B. 127. (D.)

(*i*) 2 Inst. 701.

this day, it seems, that an action on the case will lie for such neglect to repair, inasmuch as it is not a public, but a private injury; for in the former case, the remedy by indictment is the proper course to avoid a multiplicity of suits, in the latter, the party aggrieved can be remunerated in damages for the inconvenience or mischief he may have sustained.

Section II.—Of Ferries.

The same principle which compels us to call a bridge, or a river, a common highway, applies to a ferry, for it is a common passage, which is no more than a common highway (*a*). It is a liberty, by prescription or the king's grant, to have a boat for passage upon a river for carriage of horses and men, for reasonable toll (*b*). And thus an action will not lie against a man for not keeping a boat for the ferry, since it would be to multiply suits, which the law will not allow (*c*). But one who accepts the grant of a ferry is bound to keep a boat for the public good, and may be *indicted* for the neglect, although no action lies (*d*). And we have seen, that the owner of a ferry cannot suppress it, and erect a bridge, without a writ of *ad quod damnum* (*e*).

The owner may have an action on the case for a disturbance of his right. It was said formerly, that an assise of nuisance, or an action lay (*f*). However, the possession of an exclusive right to ferry from *A.* to *B.*, will not prevent persons from going by another boat from *A.* to *C.*, although *C.* be near *B.* A prescription to the above effect was proved, and the court were quite clear, that the plaintiff's demand for the enlarged right to ferry was unreasonable, for the parties were substantially and not colourably carried over by the defendant. Fraud would alter the case, but there was no pretence for that in the case before the court (*g*).

It is no answer to an action by the owner of a ferry for the disturbance of his right, that the ferryman has neglected his duty, for such a default does not, *ipso facto*, destroy the right to the franchise, which must be impeached by *scire facias* or *quo warranto* (*h*).

(*a*) 3 Mod. 294.
(*b*) Cro. El. 591.
(*c*) 3 Mod. 289, Pain v. Patrick. 1 Show. 243, 255, S. C. 1 Salk. 12, S. C. Comb. 180, S. C. Holt, 6, S. C. Carth, 191, S. C. See 2 Wils. 58.
(*d*) 1 Show. 257. Hardr. 163.
(*e*) Ante, p. 196. But the court, upon another occasion, refused an injunction to restrain the defendants from using the plaintiff's ferry. Hardr. 162. Churchman v. Tonstal.
(*f*) 22 H. 6. 14.
(*g*) 4 Term Rep. 666, Tripp v. Frank.
(*h*) 6 B. & C. 703, Peter v. Kendal.

Right of ferryman.

It has been holden, that the owner of a ferry has a right to use the land on both sides of the water for the purpose of embarking and disembarking his passengers, without having at the same time any property in the soil on either side*. For the principle is, that a ferry is in respect of the landing-place, and not of the water. It is sufficient if the landing-place be in a public highway. The original owner of the land may have granted the soil of it, and reserved out of the grant, to himself, &c., the right of using the land on both sides for the purpose of embarking and disembarking passengers (*a*).

The owner of a ferry demised it by parol at a certain rent. The lessee, finding that it did not answer, agreed with his landlord to be his boatman, and to account for all money received, and to receive daily wages. This step was holden to be a surrender by act and operation of law of the lessee's interest in the ferry (*b*). And it should seem, that such a letting, being of an incorporeal hereditament, ought to be by deed (*c*).

Custom for inhabitants to be exempted from tolls of a ferry.

A custom that the inhabitants of a certain vill should pass over a ferry toll-free has been holden good. Such a custom may have a reasonable commencement, as that the inhabitants of the town might have been at the charge of procuring the grant, and, in consideration of that, that one man should find the boat, and enjoy the tolls, but that the inhabitants should be exempt from payment. The interest of the ferryman would be encumbered with this discharge (*d*). If toll were extorted from an inhabitant under such circumstances, he might have an action on the case, because there would be a special damage (*e*). But in the particular instance which gave rise to these resolutions, judgment was given for the ferryman, the defendant, because he was charged, in an action on the case, for not keeping a boat, which, being a general, and not merely a particular damage, was held to be punishable only by indictment (*f*).

Ferry not rateable.

It has been determined, after great consideration, that the tolls of a ferry are not rateable where the owner does not reside within the parish or township. It was said in support of the liability to be rated, that a ferry was real property, that it was local in its nature; but it appearing, that the lessee of the tolls

* Overruling a passage in Savil. 11 to the contrary. Com. Dig. Tit. Piscary, who cites the same passage.

(*a*) 6 B. & C. 703, Peter v. Kendal. Savil. 11.

(*b*) Ibid.

(*c*) Id. 708. By Bayley, J. Whether a ferry be demandable in a *præcipe quod reddat?* Qu. And see 12 East. 334, n. It should seem not, after the decision in 6 B. & C., where it was held, that the land on either side of the water need not belong to the owner of the ferry.

(*d*) 1 Show. 257. Observations of Holt, C. J.

(*e*) Ibid.

(*f*) Id. 255, Payne v. Partridge.

had no land or visible property in the parish, the court held, that his property in the ferry was not within the statute of Elizabeth, for to make property rateable, it must be the subject of occupation, and must be visible and tangible (*a*). "All the cases of tolls held rateable," said Lord Ellenborough, "have been where the tolls arose out of the use of land." (*b*)

Way-leave, when rateable.

*** It may be added to this, that a *way-leave* is rateable where the parties enjoying it have the occupation of the ground, but not so where there is a mere privilege of using the right of passage. Upon principle, it resembles, in this respect, the right of common. A person who had certain way-leaves, or liberties of passage, over lands, which way-leaves, &c., he rented for the carriage of coals to the river Wear, was rated in respect of such privileges, and, on appeal, the sessions confirmed the rate. But, as in this case he had a mere right of passage, which is an easement, and not a grant of the profits of the land, the court held, that it could not be the subject of a rate (*c*). But where the appellants, in pursuance of a lease, made waggon-ways, erected a bridge, and railed off the ways, so as to maintain an exclusive possession of them, and built two houses for their servants, the court of King's Bench considered that the liability in this case was very different from that above cited, for here was clearly an occupation of the ground, and a possession of property rateable to the relief of the poor. The court further said, that they could not enter into the question, whether the Dean and Chapter of Durham (who had granted the lease) had power to grant any thing more than a mere way-leave, for if a disseisor obtain possession of land, he may be rateable as the occupier of it. The order of sessions was, therefore, confirmed (*d*).

(*a*) 12 East, 330, Rex v. Nicholson.
(*b*) 12 East, 336.
(*c*) 2 Term Rep. 90, Rex v. Jolliffe.
(*d*) 7 Term Rep. 598, Rex v. Bell.

CHAPTER IX.

Of Indictments and Pleadings generally on the Subject of Ways.

It is our purpose in this chapter to speak of the indictments which may be maintained against a parish for the non-repair of highways, against a township, and against persons liable to the obligation of repair by reason of their tenure, and also of indictments against offenders who obstruct the highway wilfully, or otherwise. Indictments for the non-repair of bridges will also be noticed, and the pleas, or defences, to all these charges will be discussed at length.

We shall then proceed to the consideration of declarations for the disturbance of private rights of ways and private bridges, and of other matters connected with the mode of proceeding when those rights are interrupted.

The pleadings will then be introduced. The manner of stating a public highway, and of shewing a title to a private way, whether it be by prescription, by grant, or of necessity, will be laid before the reader, and the chapter will be concluded by some instances of replications and rejoinders in answer to the claim of right of way when pleaded, as is above mentioned.

Indictments for non-repair of highways. Nuisances therein, &c.

First, as to indictments for the non-repair of highways, they are most commonly preferred against the respective parishes in which they are situate. The parish is burthened, in the first instance, with the liability, as has been shewn in a former chapter (*a*), and where it is not known in particular that any other parties are in reality answerable, the parish is made the subject of the indictment; and if there be any substantial defence to the charge, it is then disclosed upon the trial under the general issue, or by special pleading.

It is with the form of indictments that we have more especially to deal in this place.

Against a parish.

The ordinary charge upon these occasions is, that there is a common king's highway situate in a certain county, and that a certain part of it lying in the parish indicted, describing it particularly, is out of repair, so that the king's subjects cannot use it as they ought, and, in conclusion, it is alleged, that the inhabit-

(*a*) Ch. VI.

ants of the parish are bound to amend this way when necessary. The venue should be laid in the county where the ruinous road lies. The day is immaterial, so as it be before the caption of the indictment (*a*). There is a distinction between public and private ways in this respect, that the former need not be alleged to have existed from time immemorial; whereas, if a prescription for the private right be pleaded, such an allegation must be made. Where a plea was demurred to on account of the omission of the words, "from time immemorial", the court said, that it was quite sufficient to state in a compendious way that it is a highway, and that the instances of *indictments* were decisive (*b*). So, again, in a case where it was decided, that the public had a right to use the cranes on public quays, the plea did not allege, that Smart's Quay, which was said to be a *public, open,* and *lawful* quay, had existed from time immemorial; but the court said that the quay was in this respect similar to a highway, which might be described as, "a public and common king's highway", without saying, immemorially; and judgment was given in favour of the plea upon demurrer (*c*). So, again, where to trespass it was pleaded, that the place was a common highway for all the king's subjects, *paying a certain toll,* without saying, immemorial, here the omission of the word "immemorial" saved the plea, for it being objected that the allegation was inconsistent, Wood, Baron, observed, that it might have been a highway created by act of parliament (*d*).

The indictment goes on to say, that the way leads from *A.*, for instance, in the county of *B.* towards and unto *C.*, &c. "In ancient proceedings, a highway is stated as a road leading from one vill to another; but that is only done for the purpose of shewing that it is a highway. And it has been settled of late years, that it is not necessary so to state it in an indictment; for if it be laid to be a highway, that is sufficient." (*e*) And although modern precedents continue to mention the *termini a quo* and *ad quem*, yet there are many authorities to shew that such a description may be dispensed with. Thus, where there was an omission of this kind, the answer was, that the highway is infinite, having neither *terminus a quo,* nor *ad quem* (*f*); and

(*a*) Palm. 389. See 2 Show. 455.

(*b*) 3 Term Rep. 265, Aspindall v. Brown. S. P. Say. 167, Rex v. Brookes. And where certain ditches in a footway were laid to be to the nuisance of all the king's subjects, it was held, that the omission to state the way to have been common to all the king's subjects was immaterial. Ibid. S. C.

(*c*) 8 Term Rep. 606, Bolt v. Stennett. See also 2 Wms. Saund. 258, n. 4.

(*d*) 8 Price, 535, Sutcliffe v. Greenwood.

(*e*) By Buller, J. 1 Term Rep. 570.

(*f*) 10 Mod. 382, Rex v. Hammond. 1 Str. 44, S. C. Andr. 145, S. C. cited in Rex v. Haddock. S. P. 10 Mod. 328, Rex v. Thompson, cited there. Andr. 145, S. C. cited. S. P. 3 Keb. 89, Rex v. Nele. 2 Keb. 728, Rex v. Glaston Inhabitants. Id. 715, Rex v. Rawlins. See Latch. 183. 2 Ro. Ab. 80. 12 Mod. 409.

thus the mode of pleading it differs from the case of a private way, because "private ways are given for particular purposes, and the justification must shew that they were used for those purposes." (*a*) Indeed it is dangerous to make the allegation if it cannot be sustained, because the statement and pleading of a way from *A.* to *B.* has been often held to exclude both *A.* and *B.* As, for instance, an indictment for stopping a way at *D.*, leading from *D.* to *S.* was quashed, because it was alleged to be from *D.*, which excluded *D.* (*b*) So where the charge was for stopping a way from London to Kensington, it was considered that Kensington was excluded (*c*). The description, "from Roxeth Place to Stroud-gate," was considered also to exclude both those places (*d*). This doctrine has been confirmed by subsequent authorities. The parish of *G.* was indicted for the non-repair of a highway leading from *H.* towards and unto *G.*, (the parish indicted,) and it was moved to arrest the judgment, because *G.* was excluded by this mode of pleading. The court made the rule absolute, and Mr. Justice Grose mentioned the above case in Latch as being in point; and a subsequent allegation, that a certain part of the same highway was situate in the said parish of *G.*, made no difference (*e*). However, upon a very recent occasion, the authority of this case of Rex v. Gamlingay, must be considered as somewhat impeached by certain observations which fell from Lord Tenterden. An indictment charged the defendants with removing the gravel, &c. being upon and over a certain brick culvert, for the convenience of his majesty's subjects, passing there along *in* the parish of *S.*, &c., *in* a certain common king's highway there, leading *from* S. *to* H. The defendants were convicted; and it was contended, on the authority of Rex v. Gamlingay, that *S.* was excluded in the case before the court, and, consequently, that the judgment must be arrested. But the judge said, that the indictment contained an express allegation that the nuisance committed was *in* the parish of *S.*, that in Rex v. Gamlingay, the words, "*same* highway," referred to

(*a*) By Wilson, J. 1 H. Bl. 355. There are some old cases in Keble to the contrary of this, but they can hardly avail any thing at this day. 1 Keb. 256, Rex v. Randall. 3 Keb. 644, Ayerl v. ——. And so again 14 Vin. Ab. 384, pl. 18, where one was indicted for putting a lay-stall near the highway, and it was said in those days to be a common exception, that no *termini* were stated. 15 Car. Hulkley's case. 2 Ro. Ab. 81.

(*b*) 2 Ro. Ab. 81. But see 7 B. & C. 414, where Lord Tenterden doubts the above case, and says, that the indictment might have been quashed to prevent any question from arising.

(*c*) Latch, 183, Halsey's case. S. C. Noy. Rep. 90.

(*d*) 4 Burr. 2090, Rex v. Harrow Inhabitants. See also S. P. recognized. 1 Burr. 376, Hammond v. Brewer. 2 Ld. Keny. 33, S. C. Another objection in Rex v. Harrow was, that the highway was laid as leading from a hamlet, but that a hamlet was less than a vill or town. But it was overruled without difficulty. 4 Burr. 2091.

(*e*) 3 Term Rep. 513, Rex v. Gamlingay Inhabitants. See 5 East, 244. 1 H. Bl. 351. 2 Wms. Saund. 158, (a) n. 6. And see also 1 East, 278.

the highway mentioned in the former allegation, which excluded it from the indictment; but that if the words "to" and "from," in the present case were construed to be exclusive, an allegation perfectly consistent and sensible would be made the contrary (*a*). And by Lord Tenterden: "In common parlance, the words, *leading from a place*, include as well as exclude that place; and at present my mind is not satisfied with the decision of the court in the case of Rex v. Gamlingay, that the words *from* and *to* are necessarily exclusive." (*b*)

It was objected in an old case, that the highway ought to be mentioned as leading to a market town, but without effect, because every highway leads from town to town (*c*), and, as we have seen, if no mention at all be made of the *termini*, the indictment will be as valid, and, perhaps, it might be convenient, as well as prudent, to omit them altogether. And again, if it be undertaken to set out these *termini*, and it should turn out, that they have been *incorrectly* stated, the variance will be fatal. Thus, an indictment charged, that the way led from Great Dunmow to Little Canfield, and thence to *H. R.*, but the evidence was, that when a person arrived at Canfield, he must turn back a quarter of a mile from thence, before he could get into the road indicted. Lord Ellenborough, upon this, said, that the road indicted did not lead from Canfield and Dunmow, but from the middle of the road which led from one to the other, and he directed an acquittal (*d*). The same law as to the *termini* is applicable, as it should seem, to common ways, which lead from a village into fields (*e*). However, as we have above mentioned, with respect to venue, there must be an allegation that the road lies in a certain county, although, it seems, that if the county be mentioned in the margin, an exception for the want of it in the body of the indictment will not avail. As, where one was indicted for erecting a gate at Hornsey, in the county of Middlesex, in a king's highway leading unto Highgate, without adding in what county the gate was, the court held the indictment valid, for that the venue in the margin should extend to Highgate, but they said, that in cases of felony it was otherwise (*f*).

However, where one was indicted for stopping a cross road leading from a village called Stoke, unto a village called Melton, in the county of Dorset, the court quashed the indictment, be-

(*a*) 7 B. & C. 413, Rex v. Knight.
(*b*) Id. 415. See, in confirmation of this opinion, 2 Anst. 572, Phillips v. Davies.
(*c*) Palm. 389. 2 Ro. Rep. 412, S. C.
(*d*) 6 Esp. 136, Rex v. Great Canfield.
(*e*) See Poph. 206. 1 Brownl. 6.
(*f*) 1 Bulst. 203, Rex v. Springal. See 2 Show. 455, Rex v. Limehouse. "Limehouse aforesaid," when Limehouse had not been before mentioned, held good.

cause the county of Dorset would refer to Melton only, and not to Stoke, and so it did not appear in what county Stoke was (*a*).

And, moreover, the fact of the place being a *highway* must be stated. For where the indictment charged a nuisance to a horse-way, and not to the queen's highway, it was quashed (*b*).

What way.

The indictment for non-repair commonly expresses, that the highway indicted is "for all the liege subjects of our said Lord the King, with their horses, coaches, carts, and carriages, to go, &c." But this special description, as to the *kind of carriages*, does not appear to be necessary, although it should be stated whether the way be a foot, horse, or carriage way, for Lord Hardwicke has said, "I do not remember any authority that holds it necessary to say it is a highway for this or that *particular carriage*, for if it is a common highway, it is a highway for all manner of things." (*c*) But where there was an allegation of a public right of passing on foot, on horseback, and in carriages, and the evidence shewed a right to a foot-way only, the defendants were acquitted, there being no separate count for a footway (*d*). With respect to the description of carriages, a case happened, where it was proved, that carts of a particular kind could not pass along the highway which the indictment alleged to have been obstructed, and it was argued, that the defendants could not be convicted on that ground, but the court said, that the way was not laid as for *all* carts, carriages, &c., and that the meaning of the indictment was, that such carriages should pass along as the width of the road would permit (*e*). It is not requisite to state any exception, as to the time of enjoying the highway, which may arise from accident, as a flood, &c. (*f*); but if there should a limited user of the highway, as at certain seasons, and the indictment should assert, that it has been used by all the king's subjects at their free will and plea-

(*a*) Noy. 122, Raymond's case.

(*b*) Cro. El. 63, Madox's case. 4 Leon. 121, Keene's case. There is an old case in Keble [2. p. 728.] where the way was said to be a highway, but not a *common* highway, and so the indictment held bad; but, it seems, that such an objection would not avail now, because every highway is necessarily a common highway. See 10 Mod. 382.

(*c*) Ca. Temp. Hardw. 316, Rex v. Hatfield Inhabitants. 8 East, 6. n. S. C. cited. See also 8 East, 4, 6. Allen v. Ormond, whence it seems, that it should be stated whether the way claimed in this chapter be a horse, carriage, or foot-way. 1 Salk, 359. 2 Wms. Saund. 158. b. 3 Leon. 13. Post.

(*d*) Say. Rep. 169, Rex v. Burgess.

(*e*) Ry. & M. 150, Rex v. Lyon. S. C. 5 D. & R. 497. S. C. Nomine Rex v. Lynn and Debney. 1 C. & P. 527. No *joint* act of obstruction appearing to affect the defendants in this case, as one had succeeded the other in the occupation of the house in question, the judge required the counsel for the prosecution to state against which defendant they would proceed, there being evidence of *a separate* obstruction by both defendants. 1 C. & P. 528.

(*f*) See 2 M. & S. 262. Ry. & M. 144. 3 B. & A. 302.

sure; it will be bad for its inconsistency. And so it was held, in the case of a bridge, which the public had a right to use in times of flood only, while the indictment set forth a general right at all times (*a*).

Having stated the highway over which the right of passage was claimed, the indictment proceeds to the allegation, that a certain part of it is out of repair.

Length and breadth.

As to the usual statement of the length and breadth of the ruinous part, it was once thought to be indispensable. As where an indictment alleged the stoppage of a public way, but failed to say how many feet in length and breadth were obstructed (*b*). Even although it had been said, that the way contained by estimation so many feet in length and so many in breadth, it had been bad for the uncertainty (*c*). It was again held for law, where the indictment stated the way to contain, by estimation, about sixteen acres in length, that there was an error, inasmuch as the breadth had not also been described, and as the court estimated the fine by the breadth of the road as set out in the pleading, at that time, the objection was deemed fatal (*d*). However, this criterion was abandoned shortly afterwards, and the court came to estimate the fine by the length and breadth of the way *proved*, for the judge at the trial must be sufficiently informed for the purpose of giving judgment, and if the judgment be given in another court, that court will always be sufficiently informed of both by report. An indictment for a nuisance was, in pursuance of this principle, holden good, although it did not set out the length and breadth of the nuisance (*e*). And the same point was ruled upon a writ of error from the quarter-sessions, for the court of King's Bench would presume, that the quarter-sessions would set a fine adequate to the length and breadth of the nuisance proved, and, therefore, the objection that the higher court could not judge of the fine, was unavailable, and in this last case it was observed by Mr. Justice Wilmot, that too much precision had been formerly required according to the old cases (*f*).

(*a*) 4 Campb. 189, Rex v. Marquis of Buckingham.

(*b*) 2 Ro. Ab. 81, Halsey's case. Latch. 183, S. C. In a case which we shall presently notice, Mr. Justice Dennison said, "Halsey's case, according to the report of it, 2 Roll. Abr. 81, is too nice, as to the necessity of precision in setting out the length and breadth of the nuisance in an indictment: in another report of the same case, Latch. 183, no notice is taken of the precision mentioned by Rolle." Say. 302.

(*c*) 2. Ro. Ab. 81.

(*d*) Ca. Temp. Hardw. 105, Rex v. All Saints and St. Mary's Inhabitants. S. P. by Lord Hardwicke. Id. 316. 1 Hawk. c. 76. s. 88.

(*e*) Say. Rep. 98, Rex v. Smith. S. P. 3 Salk. 183, Egerly's case. S. P. Say. 167, Rex v. Brookes.

(*f*) Say. Rep. 301, Rex v. East Lidford. See also Starkie's Criminal Pleading, pp. 192. 693.

Road, when in two parishes, *ad medium filum viæ.*

If the road indicted lie in two parishes, the indictment ought to point out particularly what part lies in one parish, and what in the other. Therefore, where it was merely alleged, that a certain part of the said way, in a certain lane, &c., in the parish of St. Pancras, was ruinous and out of repair, and it appeared in evidence, that half of the lane lay in Islington, and the other half in Pancras parish, the mode of laying the charge was holden insufficient, for want of so stating the situation of the way (*a*). In declaring in trespass, however, this rule does not apply. For where the plaintiff alleged the breaking and entering of Shepherd's Lane, which was an open parish highway, and it appeared, that he was entitled to the soil and freehold of half the lane opposite to his own inclosures, it was objected, that he was not justified in declaring for a trespass in the lane generally: but by the court; if the defendant meant to drive him to confine the trespass complained of to that part of the lane which was his, he should have pleaded soil and freehold in another, which would have obliged the plaintiff to new assign (*b*).

In the parish.

But it is indispensable to allege the way in question to be within the parish. And for an omission of this kind a judgment of the quarter-sessions, upon a presentment, was reversed (*c*).

We have seen, that where a parish is situate in two counties, the indictment must charge the whole parish, and not that only where the ruinous road lies (*d*). Having alleged that the road is a highway, and within the parish, the indictment goes on to describe the state of decay and want of repair (*e*), and that the king's subjects are unable to use it, and then, lastly, it charges the inhabitants of the particular parish with the required reparation.

The indictment is good without naming any person in particular (*f*).

Indictments against several, stating, that they, and each of them, have not repaired the streets before their houses, it is said, have frequently been holden bad (*g*).

Contra pacem.

The indictment usually concludes, "against the peace of our said Lord the King," &c. Where Lady G. was indicted for stopping a highway, but the offence was not laid to be *contra*

(*a*) Peake's N. P. Cases, 220, Rex v. St. Pancras Inhabitants.
(*b*) 11 East, 51, Stevens v. Whistler.
(*c*) Cowp. 111, Rex v. Hartford Inhabitants. But see Rex v. Shelderton Inhabitants, 2 Keb. 221.
(*d*) Ante, p. 86.
(*e*) See 2 Lord Raym. 1169.
(*f*) 14 Vin. Ab. 382, L. 1, Walker and Measure.
(*g*) Id. 386, pl. 7.

pacem, it was said, that a misfeasance ought to be laid *contra pacem*, but that it was different in the case of a non-feasance, and the indictment was quashed (*a*). But now, after verdict, or outlawry, or confession, default, or otherwise, it is declared, that no judgment upon any indictment or information for any felony or *misdemeanor* shall be stayed or reversed for want of the words "against the peace." (*b*)

Indictment against a township, &c.

This is the ordinary method of proceeding when a road is found to be ruinous and out of repair, but a particular division of a parish, as a hamlet, &c., may be the subject of such an obligation, and in that case the indictment is somewhat different. The highway is set out as mentioned above, but it is described as lying within the particular division or precinct at *L.*, within the constabulary of *A.*, for instance, in the parish of *B.*, and that it is in need of repair. Where the obligation lies upon the inhabitant of a particular district, as in the case before us, it must be especially mentioned, whether by custom, prescription, or legislative provision, and, therefore, the indictment proceeds to allege that within the parish there have been divers townships from time immemorial, of which *L.* is one, and that *L.* has always repaired the way, which would otherwise be repairable by the inhabitants at large, and also the ruinous part of the way, the subject of the indictment, and, consequently, that *L.* is still bound to do such repairs as may be necessary. Another count may be added, stating that the several townships have been accustomed (if such be the case) to amend their own highways respectively, and independently of each other.

In this indictment the prescriptive liability to repair is mentioned, and for want of such an averment a judgment has been reversed upon error (*c*). Where the charge was, that the inhabitants of the division of Great B. ought to repair when necessary, it was determined, upon a writ of error from the sessions, that the judgment must be reversed; for it ought to have been shewn, that these inhabitants *had* repaired, and not merely that they immemorially ought to repair, as the indictment stated (*d*). So, where the defendants were indicted for the non-repair of a way to a church, but there was no allegation of the reasons for their liability, either by tenure or otherwise, the indictment was holden to be bad (*e*).

(*a*) Godb. 59, the Lady Gresham's case. S. P. Cro. Car. 584, Leyton's case.

(*b*) 7 G. 4. c. 64. s. 20.

(*c*) Andr. 276, Rex v. Marton Inhabitants.

(*d*) 5 Burr. 2700, Rex v. Great Broughton Inhabitants. S. P. 2 Term Rep. 514, Rex v. Linkfield Street in Rygate, cited.

(*e*) 2 Show. 201, Rex v. Mayor and Burgesses of Warwick.

Again, it was said by a learned judge, that "where the indictment is against a township, or particular persons, it must allege that from time immemorial they were bound to repair; which shews that the particular allegation is not necessary where they are bound by the general law." (*a*) And where a hamlet was charged, without saying how, the court directed the judgment to be arrested, observing, that the objection was to the substance, and not merely to the form (*b*).

So, where the inhabitants of an extra-parochial hamlet were indicted, but it was not stated, that they were immemorially bound to repair, nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair, the indictment was holden bad, and the judgment reversed (*c*). As the hamlet was without the parish, it seems also, that a consideration ought to have appeared, according to the rule which is established, when one parish seeks to throw the burthen of repair upon another.

We have seen, that no consideration need be shewn for charging a particular division of a parish with repair (*d*); and although in one case (*e*), a consideration did appear on the face of the record, yet "the object of the form of the plea in Rex v. Ecclesfield [the case mentioned], probably was to allow greater latitude to the evidence in support of it, and also because possibly the road indicted in that case was not an immemorial highway." (*f*) The advantage gained, therefore, by alleging that each sub-division has been accustomed to repair independently of the rest, is, that evidence may be admitted of the general custom (*g*). If there be any exceptions to this general custom, however, these also should be specially alleged (*h*).

And so it is in the pleading or statement of exceptions, if any road be exempted out of the general course of repair. As where the indictment charged the corporation of Liverpool with the repair of highways within their township, *except such as ought to be repaired according to the form of the several statutes in such case made*, but it failed to shew that the highway indicted was not within any of the exceptions. Judgment was therefore arrested (*i*).

(*a*) By Ashhurst, J. 2 Term Rep. 111.
(*b*) 2 Term Rep. 513, Rex v. Penderryn Inhabitants. See also 2 Wms. Saund. 158, n. 9.
(*c*) 2 B. & C. 190, Rex v. Kingsmoor Inhabitants.
(*d*) Ante, p. 79.
(*e*) Rex v. Ecclesfield, 1 B. & A. 348.
(*f*) By Abbott, C. J. 4 B. & A. 624.
(*g*) 2 Stark. Crim. Pleading, Vol. II. p. 698, in the note.
(*h*) Ibid.
(*i*) 3 East, 86, Rex v. Mayor, &c. of Liverpool.

Another form of indictment is to charge a particular person, or particular individuals, by reason of his or their tenure; and in this case the same mode is pursued as in the proceedings against a parish, only that instead of stating the liability of the parish at the end, it is alleged that *A. B.*, late of ——, ought, by reason of his tenure of certain lands, situate, &c. to do the needful reparations. The indictment must be by reason of *tenure* (*a*).

Indictment against a person *ratione tenuræ.*

Although it was formerly holden, that the word "*his*" was indispensable in the expression, by reason of his tenure (*b*), this is not so at present. Indeed, the case in Noy was overruled not many years afterwards, when the court said, that the precedents were generally without the word, *suæ* (*c*). And in another case, the court recognized the case in Ventris, and observed, that if, in the matter before them, it were needful to use the pronoun, it was impliedly averred, by subsequently calling the house, by reason of which the defendant ought to repair, his mansion house (*d*).

The words, "late of," &c. are usual, and for want of describing the defendant to be an inhabitant of any place, an indictment for non-repair of a highway was once quashed (*e*). It must be shewn, also, that the party is liable by reason of tenure of some property, as a house, &c.; for thus it appears how he has become chargeable. So that where an indictment for not paving the highway omitted to say, that the defendant was seized of any house, or that he had any tenement, it was quashed for uncertainty (*f*).

It is said in the old books, that if a man be bound to repair a way by reason of tenure of such land, title of prescription need not be alleged in a presentment or a plea, because a prescription is implied in the estate of inheritance in the land, but that where one is bound by reason of his residence, a prescription must of necessity be alleged (*g*). It follows, that the estate which the

(*a*) Sty. 400.

(*b*) Noy. Rep. 93. It was said, that another might have the land. Latch. 206, semb. S. C. See 5 H. 7. 5.

(*c*) 1 Ventr. 331, Rex v. Fanshaw.

(*d*) 1 Str. 187, Rex v. Corrock. 11 Mod. 302, S. C. See 2 Wms. Saund. 158, n. 9, and especially the observations of Mr. Sergeant Williams on Sty. 400, which also see.

(*e*) Noy, Rep. 87. Sir Richard Lucy's case. Where one was indicted for encroaching upon the highway, it was held no objection, because it was not expressed of what place he was, for process of outlawry lay not against him, but distress. Cro. El. 148, Lord Dacre's case. The statute of additions only extends to cases wherein process of outlawry lies. Per Lee, C. J. 1 Wils. 245.

(*f*) Godb. 400, Sergeant Hoskin's case.

(*g*) Keilw. 52. Sty. 108, Rex v. Spiller. But see 1 Sid. 464, Rex v. Staughton. 2 Wms. Saund. 158, n. 9, recognizing the case in Keilway as good law.

occupier has in the lands charged is immaterial (*a*). Inhabitants as such, cannot hold lands by tenure, and, therefore, an indictment charging the inhabitants of a town, by reason of their tenure of certain lands, with the repair of a bridge, was holden bad (*b*).

An indictment charged an individual with the repair of a bridge by reason of his being the *owner and proprietor of a certain navigation,* and it was contended, that these words were equivalent to *ratione tenuræ.* The latter expressions, however, were said by Lord Ellenborough to embody the condition upon which the land is granted, by the technical sense given to them. But ownership at the utmost implies only estate and quantity of interest. Therefore, as a person could not be chargeable to the repair of a bridge, merely from the circumstance of his being the owner of a navigation, and as the allegation of ownership was the only charge in the indictment, the judgment of the quarter sessions was reversed (*c*).

Against trustees.

We do not find any indictments against trustees of a turnpike road for non-repair; because, although they may be and are directed to repair roads out of the money they receive for tolls, such tolls are only an auxiliary fund in their hands, the parish or township, &c. being primarily liable. And by Abbott, C. J. in a late case, "It is strange, if the trustees are liable, that in the multitude of turnpike acts, almost all of which contain similar provisions to the present, no case has yet occurred, of any indictment being preferred against persons in that situation." (*d*)

With regard to presentments, they must allege the offence to have been done *against the form of the statute.* So that where there was a presentment by a magistrate under 13 G. 3, of a nuisance in a highway, which stated, that the magistrate had presented *by virtue of an act,* &c., omitting to conclude, "against the form of the statute," it was moved to arrest the judgment, and the court made the rule absolute, for, whatever the offence might be, they said, it was only presentable as an offence against the act (*e*). And by Lord Ellenborough, C. J., the words "by virtue of the act," &c. only refer to the magistrate's power to present, and not to the offence presented (*f*).

(*a*) 1 Salk. 357. 7 Mod. 55. See 3 Salk. 182, and Sir W. Evans's note upon that passage.

(*b*) 2 B. & C. 166, Rex v. Machynlleth and Pennegoes Inhabitants.

(*c*) 1 M. & S. 435, Rex v. Kerrison. It seems, that an indictment founded upon a private act of parliament, should set forth the act. 1 M. & S. 439, by Abbot, arguendo.

(*d*) 2 B. & A. 183. See ante, p. 77.

(*e*) 13 East, 258, Rex v. Winter.

(*f*) Id. 260.

Before we speak of indictments respecting bridges, it may not be improper just to mention some of the answers which are given to the charges for non-repair above mentioned.

Plea in abatement.

It would be a good plea in abatement to say, that it is not shewn by the indictment, of what vill the defendant is. The court expressed themselves to this effect, where the defendant was alleged to be of the parish of Shepey, there being four *vills* in the parish (*a*), or that the road has been set out in the indictment with such uncertainty, as that the charge would apply to other roads (*b*). But where the defendant pleaded in abatement, that there were four vills in the parish of Shepey, and it was not shewn in which of the vills the highway lay, the court were against him upon this point (*c*).

Pleas to indictments for non-repair.

Under "not guilty," the parish can do nothing except to shew that the way is in repair, that it is not a highway, or that it does not lie within the parish: if they would cast the burden upon others, they must plead specially, because their obligation is of common right; but a private individual, or such as are not bound of common right, may be relieved under the general issue only; but should they think fit to deny their obligation, these latter persons must then go further, and shew who, in particular, ought to repair (*d*). It may be added, that the plea of not guilty will suffice for the parish where an act of parliament casts the burden on others (*e*).

It may just be observed, before we proceed to illustrate the foregoing positions, that if a highway be described too indefinitely in an indictment, advantage of the error can only be taken by plea in abatement. It was alleged, that there was a highway leading from Hammersmith towards and unto Uxbridge; and, upon this, it was said, that the road had been as well described as the road to London, for the description would apply to many other roads. But Lord Ellenborough answered, that this generality of statement was a subject for a plea in abatement, since, in fact, the road in question did lead from Hammersmith to Uxbridge (*f*).

Not guilty by parish.

With respect to the plea of not guilty by the parish, it was said, concerning the amending of Leather-lane, by Holt, C. J., that if you plead not guilty, it goes to the repair or non-repair; but if you will discharge yourself, you must do it by prescrip-

(*a*) Say. 119, Rex v. Blower. See 2 Inst. 669.
(*b*) 1 Stark. 358.
(*c*) Say. 119, Rex v. Blower.
(*d*) 2 Wms. Saund. 159, n. 10. 1 Str. 181, 184.
(*e*) 3 Campb. 222.
(*f*) 1 Stark. 357, Rex v. Hammersmith Inhabitants.

tion, or *ratione tenuræ* (*a*). And this position has been uniformly adopted. When, however, the burthen of repairing is transferred from the inhabitants of the parish by a public act of parliament, to which all are supposed to be privy, and of which all are supposed to have cognizance, the rule was said by Lord Ellenborough not to apply (*b*). But the parish may also prove that the way is not a highway, or not within the parish (*c*); for the defendant may controvert every thing on not guilty, which the prosecutor is bound to prove (*d*); and Pratt, C. J. said, that according to his notes of Rex v. Hornsey, Holt, C. J. had declared, that the defendants might negative the highway (*e*). However, according to the report in Carthew, the inhabitants of Hornsey pleaded not guilty; and Holt, C. J. held, that the fact of the way not being a highway *could not be given in evidence under the general issue;* but the other judges were of a contrary opinion (*f*). Yet if the parish lay the burden upon others in pleading, they admit the highway, and so, of course, cannot disprove it at the trial (*g*); and if they deny their liability generally, they must name the persons, &c. who are bound to repair (*h*).

Various pleas may be put on record on behalf of parishes, as that they are not guilty as to part of the road, and for the rest, that particular individuals are bound to the repair of it; that the parish consists of several townships, each of which is bound by custom to repair its own road, &c. (*i*) With regard to the last plea, Mr. Sergeant Williams has these observations: "The way of pleading the prescription, [that is, for each township to repair,] seems to be, that each district claiming an exemption from repair should state in a separate plea to the indictment, 'that the parish has immemorially been divided into a certain number of districts or townships called *A. B. C.* (naming them); and that the inhabitants respectively of the several districts of *A.* and *C.* (the district in which the highway lies) have immemorially been used and accustomed to repair and amend the several and respective highways, situate and lying in their said respective districts, independent of each other; and that the said part of the said highway in the said indictment mentioned lies in that part of the said parish called the district of *C.*; and by reason of the premises, the inhabitants of the said

(*a*) 1 Mod. 112, Rex v. St. Andrews. 3 Keb. 301, S. C. 3 Salk. 183. 1 Ventr. 256. S. P. Comb. 312, Rex v. Terrel. Id. 396, Rex v. Ireton Inhabitants. 3 Campb. 223. By Lord Ellenborough.

(*b*) 3 Campb. 223.

(*c*) 1 Str. 177, Rex v. Norwich Inhabitants, Forteseue, J. *contrà*.

(*d*) By Eyre, J. Id. 183.

(*e*) Id. 184, Rex v. Hornsey, cited. 1 Show. 291. S. C.

(*f*) Carth. 212, Rex v. Hornsey Inhabitants.

(*g*) 11 Mod. 273.

(*h*) Carth. 213. 4 Mod. 38, S. C. Fort. 254, S. C. 12 Mod. 13, S. C. Holt, 338, S. C. 1 Show. 270, 291, S. C.

(*i*) See 2 Stark. Criminal Pleading, Vol. II. p. 798, &c.

district ought to have repaired the same independent of the inhabitants of the said district of *A.* in the said parish. And this, &c. wherefore, &c.'" The prosecutor then traverses the prescription, and issue is taken upon it (*a*).

But where the inhabitants of a parish put in a plea, stating that the parish from time immemorial was divided into seven townships, that such townships had repaired, independent of each other, the highways situate respectively within them; that part of the highway indicted, and said to be ruinous, was in the township of *G. B.*, and that the residue was situate within the township of Little *B.*; and, further, that the respective townships of Great and Little *B.* ought to repair, &c. there was a special demurrer, because the plea did not set forth or distinguish what part of the highway alleged to be ruinous lay within the township of *G. B.*, and what part within Little *B.* The court were of opinion that the demurrer was good, inasmuch as the parishioners must necessarily have known the limits of their several townships; and they were bound to shew with certainty the parties liable to repair any part of the way indicted, and in what right they were so bound. The counsel for the defendants, however, had leave to amend before argument (*b*).

It is worthy of observation, that the parish when they seek to throw the burden upon others in their plea, ought not to traverse their obligation, because it is matter of law; but a particular person, if he plead specially (although such pleading is unnecessary) to the indictment, must in that case traverse his own liability, although he shew in particular the parties whom he considers to be responsible (*c*). A parish may also plead that another parish ought to repair, but then a special consideration must appear upon the record. The law upon this subject has been fully stated in a former chapter (*d*).

Pleas by individuals.

With regard to pleas by a private person, we have said, that under the general issue of not guilty, he may shew his non-liability to repair, because the charge against him is not of common right (*e*). And so it is, where a particular division of a parish is indicted, for it is against common right to proceed against a district (*f*). However, if such parties plead specially, it is not enough that they traverse the right to repair, but it must be

(*a*) 2 Wms. Saund. 159. (c) n. 10. Such an issue was tried in 1800, before Heath, J. at Hereford, and the jury established the prescription. Ibid. citing Rex v. Leominster Inhabitants.

(*b*) 11 East, 304, Rex v. Bridekirk Inhabitants.

(*c*) 2 Wms. Saund. 159. (b) n. 10.

(*d*) Ch. VI.

(*e*) 1 Str. 180, 184. 3 Salk. 183.

(*f*) 2 Wms. Saund. 159. (a) n. 10, Rex v. Wheaten Aston.

shewn also who ought to do that duty (*a*); and, moreover, if they so plead, and shew who ought to repair, they must traverse their own liability: the allegation and the traverse are necessary (*b*). And, as in the case of the parish, if there be a special plea that another ought to repair, the highway is admitted. So that where the defendant pleaded that the inhabitants of *D.* ought to repair the way, without this, that he the defendant ought, and he then desired to give evidence, that the way was not a highway, the court held that he was concluded by his plea, since he had confessed the highway (*c*). Where one was presented for not repairing a highway by reason of the tenure of lands, which it was alleged he had inclosed and encroached, and pleaded that others ought to repair, without this, that he ought to repair, *by reason of tenure,* his plea was holden good, although it was contended, that the *encroachment* should have been traversed. For the principal matter was his alleged liability by tenure; and if he had traversed his obligation to repair by reason of encroachment, he had traversed a matter of law, which would have been bad pleading (*d*).

Indictments for obstructions, &c.

There are other indictments against persons in regard of highways, besides such as are presented for non-repair. As for obstructions, on which occasion the act of obstruction complained of must be stated accurately. A presentment was made at the leet, that the defendant had *diverted* the queen's highway, and it was held void, because a highway cannot be diverted, (the word divert rather pointing towards the diversion of a watercourse, which may be,) but may be obstructed or stopped (*e*).

It is a common form to use the words, "with force and arms" in an indictment of this kind, but they are not necessary (*f*). And by the new act, no judgment upon any indictment or information for any felony or misdemeanor shall be stayed or reversed, whether after a verdict or outlawry, or by confession, default, or otherwise, for want of the words, "with force and arms." (*g*)

Again, there may be an indictment for encroachments on the highway (*h*). And so again, there may be indictments for nuisances to the highway, by carrying on improper trades near it, &c. As where one erected a tallow furnace across the street of Denmark House, in the Strand, it was found to be a nuisance (*i*). In an

(*a*) 1 Sid. 140.
(*b*) 2 Wms. Saund. 159. (b) n. 10.
(*c*) 11 Mod. 273, the Queen v. Brown.
(*d*) 2 Saund. 160, Rex v. Stoughton.
(*e*) 1 And. 231, Agmondesham v. Cornwallis.
(*f*) See stat. 37 H. 8. c. 8. Poph. 206, Hebborne's case.
(*g*) 7 G. 4. c. 64. s. 20.
(*h*) See Cro. El. 231, Chambers and Johns.
(*i*) Cro. Car. 510. Tohayle's case, cited there.

indictment of this sort, it is sufficient to lay the nuisance to have been committed *near* the highway. The defendant was indicted for this offence, and it was laid to have been committed near the highway, and near several dwelling houses. It was objected, that, as the pleading did not state the nuisance to have been done *in*, but only *near* the way, it was insufficient; but the court said there was a nuisance to such as were in the highway, and that the indictment was good in this respect (*a*). So again, where the indictment laid the offence to have been "at the parish of Twickenham, near the common highway," not saying IN: it was held that this method of pleading was sufficient (*b*).

Indictment for not performing statute duty.

It was held, before the making of the present highway act, that an indictment would not lie for the non-performance of statute duty, there being another remedy. And upon a case of this kind, the words "*being* then and continually thereafter *surveyors of the highways*, &c." sufficiently alleged the prosecutors to be surveyors (*c*).

Pleas.

The ordinary plea to these last mentioned indictments is, not guilty, but other pleas may be adopted where necessity requires. To an information against five persons for obstructing a highway, they pleaded a writ of *ad quod dammum*, and inquisition thereon, without this, that they inclosed and stopped it with hedges *ad commune nocumentum*; and it was resolved that the plea was not good, because it did not go further and say, that the king's licence was actually obtained; for the writ issued to inquire, whether it would be to the damage, &c. if the king should grant such licence to stop the way (*d*). Where there was an indictment against a man for not working towards the repair of the highways; and shewed that six days were appointed by the justices, but that the defendant did not come within any of the six days, it was holden bad, for want of setting out the particular days (*e*).

Indictments for non-repair of bridges.

Having considered the indictments against parties for the non-repair of highways, in the ordinary sense of that term, together with the pleas which are applicable on such occasions respectively, we proceed to say a few words on the subject of indicting *bridges*. And here it is to be observed, that, as in the case of common highways, the parish, in which each road is situate, is generally the subject of an indictment, so the county where the bridge is which needs reparation, must be resorted to, unless it be known that the burthen of repair lies upon others.

(*a*) 2 Str. 686, Rex v. Pappineau.
(*b*) 1 Burr. 333, Rex v. White and Ward.
(*c*) 2 Burr. 832, Rex v. Boyall.
(*d*) Cro. Car. 266, Rex v. Warde and Lyme.
(*e*) 1 Salk. 357, the Queen v. Kime. 2 Lord Raym. 858, S. C. See now the highway act, 13 G. 3. c. 78.

The indictment alleges, that the bridge in question is a common king's highway; and that it is in a ruinous and decayed state, so that the public cannot use it as they have been accustomed, and it is then alleged, that the inhabitants of the county are bound to do the necessary repairs; or, if the prosecution be against an individual by reason of his tenure, that he is on that account, liable to the repair alluded to.

The usual description of the bridge is, "a common bridge, commonly called ———, lying and being in the parish of *B.*, in the county of *E.*, in the common king's highway." (*a*) Where an indictment stated the bridge to be a common bridge, but did not shew that it was in the highway, it was considered by Rolle, C. J., to be sufficient, without the addition of the latter allegation (*b*). The county where the bridge is situate must be mentioned; and for want of this, an indictment against a person for not repairing *ratione tenuræ*, was quashed (*c*). And the same principle prevailed where the indictment stated, that an ancient bridge, within the *parishes* of Machynlleth and Pennegoes, was out of repair, and that the inhabitants of the said parish of Pennegoes, and the inhabitants of the said *town* of Machynlleth were liable, by reason of the tenure of their lands and tenements, without alleging that the parishes before mentioned were within the *town*. Here was a fatal defect in the indictment for not making the inhabitancy of the persons liable to repair correspond accurately with the place where the bridge was alleged to be situate; and the judgment of the sessions was reversed for this objection (*d*). The kind of bridge should also be expressed, as whether it be a foot or horse bridge, &c. Thus, the usual form is to say, that the king's subjects may pass and repass at their free will and pleasure, with horses, carts, and carriages.

And where an indictment failed to shew the kind of passage which was claimed over the bridge indicted, it was quashed, upon an exception taken, for this reason (*e*).

In another case, also, the court expressed a strong opinion to the same effect, although they did not quash the indictment, then under their consideration, upon that ground (*f*).

If the words, "at their free will and pleasure," be used, care must be taken to sustain that allegation by the evidence. For,

(*a*) See Stark. Crim. Pleading, Vol. II. p. 701.
(*b*) Sty. 108, Rex v. Sir Henry Spiller. See 1 Salk. 359. 6 Mod. 255. 2 Lord Raym. 1174. Holt's cases, 129.
(*c*) Sty. 108, Rex v. Spiller.
(*d*) 2 B. & C. 166, Rex v. Machynlleth and Pennegoes Inhabitants.
(*e*) Sty. 108, Rex v. Spiller.
(*f*) 1 Salk. 359, Regina v. Sainthill. S. C. 2 Lord Raym. 1174.

where there was such a description of the right, and it turned out at the trial that the bridge was locked, except in times of flood, Lord Ellenborough said, that the evidence disclosed a limited right only on the part of the public; and that the indictment, which set out a right without limit or qualification, could not be supported (*a*). And where the indictment charged, that a bridge was a public carriage bridge, and also for the king's subjects to pass and repass on foot, but it appeared, upon the evidence, that the bridge was not a carriage bridge, although it had been used by passengers on horseback and on foot, it was holden that the defendants could not be convicted (*b*).

But where it appeared, that the bridge indicted was open at all times to carriages, &c., an averment, that it was used by all subjects, at all times, &c., was held good, although it was proved, that the public used it on occasion of floods only, for it might have been used at all times (*c*).

Moreover, the bridge must be alleged to be ruinous and out of repair; and an indictment was quashed for this amongst other errors which were moved (*d*).

It was objected, in an old case, that the quantity of the road on the bridge out of repair ought to have been shewn, that is, so many feet in length, and in breadth; but the indictment having stated, that half the bridge was in need of repair, the court overruled the exception (*e*); and according to the form of modern precedents, it does not now seem to be necessary to state the length and breadth.

There was an indictment for not repairing three public bridges; and the words were, "usque ad pontem de Harford ad exteriorem partem rivi." The chief justice considered, that the *farthest* bridge was included in these expressions, inasmuch it was said to extend *ad exteriorem partem rivi* (*f*).

If the indictment be against a person for non-repair by reason of his tenure, it is the safer course, in general, to allege, that the bridge has existed immemorially. But if the bridge has been constituted within the time of memory, or altered or enlarged, as from a foot into a carriage bridge, &c., it will then be improper to state the burthen of repair as by prescription, although the original liability to repair *pro ratâ* still continues. The inhabitants of the West Riding were indicted for not repairing a public carriage

(*a*) 4 Campb. 189, Rex v. Marq. of Buckingham.
(*b*) Stark. on Ev. Pt. 4. p. 316, Rex v. Lancashire Inhabitants.
(*c*) Ry. & M. 144, Rex v. Devon Inhabitants.
(*d*) Godb. 346, Bridges and Nicholls's case. Another error was, for not saying that the bridge was over a water, but this is no ground at this day for quashing an indictment.
(*e*) 1 Salk. 359, Regina v. Sainthill. S. C. 2 Lord Raym. 1174.
(*f*) 1 Str. 177, 180, Rex v. Norwici Inhabitantes.

bridge. They pleaded that certain townships had immemorially repaired, &c., and issue was joined. It appeared in proof, that this bridge had been originally a foot-bridge, that it had been enlarged to a horse-bridge by the townships at their expense, and, at length, to a carriage-bridge. The judge thought that the evidence did not support the issue, for the proof was, that the carriage-bridge had been erected within time of memory; but the jury found for the Riding. The court granted a new trial (*a*); and by Buller, J., "where a party is bound to repair a foot-bridge, he shall not discharge himself by turning it into a horse or carriage-bridge, but still he shall only be bound to repair it as a foot-bridge, that is *pro ratâ;* but otherwise the county are bound to repair all bridges of public utility." (*b*)

As we have seen, the proper way of charging a party under these circumstances, is, by reason of his tenure; and, therefore, where Sir H. S. was said to be bound to repair by reason of his manor, the indictment was holden insufficient, for want of shewing that he was bound by the tenure of his manor, for it did not appear, by that mode of pleading, that he was possessed of the manor (*c*). Clearly, then, if the charge were, that one ought to repair, without making any mention at all of the tenure, it would be bad (*d*), if it were intended to prove a liability of that nature. It is no objection to an indictment which charges several with non-repair, that one only is found liable *in manner and form as is supposed by the said indictment.* For each may be bound to repair for their respective lands; and contribution may be had *pro ratâ.* And so it was adjudged in an old case (*e*).

Against a parish.

There may also be an indictment against a *parish* for not repairing a bridge; and here, again, if the bridge have not existed from time immemorial, a prescriptive liability must not be alleged. To an indictment against the county of Surrey, it was pleaded, that the *said bridge* had been immemorially, and still ought to be, repaired by the inhabitants of *F.* parish. The original bridge was a small wooden bridge, but this having been destroyed by fire, a much larger bridge of brick had been constructed, and it appeared, that although the parish of *F.* had always repaired the old, the trustees of the high road had exclusively maintained the new bridge. Lord Ellenborough then inquired, how it could be made out that *F.* parish had immemorially repaired the *said bridge* mentioned in the indictment, and no sufficient answer having been returned to this objection, there was a verdict

(*a*) 2 East, 353, n. Rex v. Yorkshire West Riding.
(*b*) Id. 354, n.
(*c*) Sty. 108, Rex v. Sir Henry Spiller.
(*d*) Godb. 346.
(*e*) 1 Ventr. 331, Rex v. Sir Thomas Fanshaw. See 27 Ass. pl. 8. Bro. Prescription, pl. 49, citing S. C. Bro. Nusance, pl. 24, citing S. C. And see also 14 East, 348, Rex v. Mayor, &c. of Stratford-upon-Avon.

against the plea (*a*). So again, where an indictment alleged that the *bailiffs* and freemen of Kingston had immemorially repaired a bridge, but it turned out, that the office of bailiff was comparatively of modern creation, it was holden, that the indictment could not be supported. A *plea* by a county to an indictment against them shared the same fate for the error of stating that immemorial liability (*b*).

Covenant for non-payment of the expenses of rebuilding a bridge.

If a contractor be compelled to sue for his expenses in the rebuilding of a bridge, he must be careful to proceed against the right party. Certain justices were empowered to contract for the rebuilding of a bridge in Bedfordshire, and to appoint superintending justices. The contractor was to give security to the clerk of the peace, in whose name all actions, &c. were to be prosecuted or defended, and who also was to be reimbursed his costs upon such occasions. The expenses of rebuilding were to be paid out of the county rate. The superintending justices covenanted with the contractor by deed, that they, or the treasurer of the county, would pay him a certain sum, by instalments. He brought an action against these justices for the non-payment of two of these instalments, and the defendants demurred. The court held, that the action should have been brought against the clerk of the peace, for that officer was to be indemnified for his costs, and to him the contractor was to give security. Judgment was given for the magistrates (*c*).

Pleas.

This mention of a plea naturally leads us to observe, that various pleas may be offered in answer to indictments for the non-repair of bridges, as in the case of highways. And the same rule regarding the evidence under a plea of not guilty prevails on the subject of bridges, as we have already seen to be applicable when roads are indicted (*d*).

The plea must directly answer the charge, or traverse some material fact. An information was prosecuted against certain inhabitants for not repairing *L.* bridge, and it was called an ancient bridge in the pleadings. The defendants, protesting that it was not an ancient bridge, said, that it had been lately erected by the king for the benefit of his mills, and, upon demurrer, this plea was holden ill, for it did not traverse that the bridge was an ancient bridge, which was the substance of the information (*e*). Where a bridge lay in two parishes, it was considered insufficient for the county of *E.* to plead, that a certain common bridge *in*

(*a*) 2 Campb. 455, Rex v. Surrey Inhabitants.
(*b*) 1 B. & A. 64, n. Rex v. Middlesex Inhabitants, cited.
(*c*) 2 Moore, 621, Allen v. Waldegrave.
(*d*) See ante, p. 233, and 2 Wms. Saund. 159. (a) n. 10. See also 2 Lev. 112, Rex v. Nottinghamshire Inhabitants. S. C. 3 Keb. 370.
(*e*) Cro. Car. 365, case of Langforth Bridge.

D. *parish* had been formerly out of repair, and that one Sir *T. F.* had been convicted for the non-repair of it, and, therefore, that the county were not liable, because the bridge contained in the information was said to lie in two parishes, but the bridge mentioned in the plea only in one. Sir *T. F.* might be bound to repair so much of the bridge as lay in *D.* parish, and the county the other part (*a*).

We have now done for the present with public rights of way, and proceed to speak of the mode of pleading private rights of this nature, although it should be observed, that the *plea* of a public right of way will be mentioned in a future part of the chapter, when the subject of defences to actions comes to be discussed.

Declarations for disturbance of ways.

First, as to declarations, a very common mode of proceeding is by an action on the case for disturbing the plaintiff's right of way. And here, according to the usual rule in cases of incorporeal hereditaments, it is sufficient to declare upon the *possession* of the premises to which the way may be appurtenant. So that it is enough to say, that the plaintiff is lawfully possessed of a certain messuage, &c. *. And this rule holds also, where it is sought to charge a *defendant* for non-repair, whether he be owner or occupier. An action was brought against the defendant for not repairing a private road which led through his grounds. The declaration stated the possession of a messuage, &c. by the plaintiff, and that the defendant was possessed of a certain close, &c., and that, by reason of his possession of the said close, &c., he ought to have maintained the way. There was a demurrer to this declaration, and a distinction was suggested between the mode of charging the owner of the inheritance, and the occupier only, and it was said, that in the latter case, a prescription ought to be alleged. But the court held, that the defendant had been sufficiently charged *by reason of his possession* (*b*). "In the former case, the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it; but in pleas, the defendant, knowing his own estate in right of which he claims a privilege, must set it forth." (*c*) So, where the de-

(*a*) Tho. Raym. 384, Rex v. Essex Inhabitants.

* An allegation, that the plaintiff was possessed of a certain piece of pasture was held bad for the uncertainty. 1 Lutwy. 124, Jones v. Humond. As to the occupation, see post, p. 253.

(*b*) 3 Term Rep. 766, Rider v. Smith. 1 Lutwy. 119, Blockley v. Slater. S. P. 1 Lord Raym. 266, Dorney v. Cashford. See Cro. Car. 575, disturbance of a watercourse. 4 Mod. 420. 2 Lord Raym. 1093. Willes, 508, Blissett v. Hart. 6 B. & C. 703, Peter v. Kendal. 2 Y. & J. 285, Trotter v. Harris, disturbance of a ferry. 1 Wils. 326, disturbance of a pew. The cases of Holbach v. Warner, Cro. Jac. 665, Baker v. Brereman, Cro. Car. 418, are overturned by this decision of Rider v. Smith. And the opinion of the judge in Jones v. Hammond, 2 Lord Raym. 751, is also shaken by the same authority. See also 2 Saund. 113, n. 1.

(*c*) 3 Term Rep. 768, by Buller, J.

claration merely stated, that the plaintiff was seised in fee of a parcel of ground adjoining to the defendant's meadow, and had a certain way, &c., it was objected, that no title had been shewn by prescription or otherwise, but the court held the pleading sufficient (*a*). The plaintiff having said, that he is possessed of a messuage, &c. proceeds to declare, that *by reason thereof* he is entitled to a certain way *. Here it is observable, that if the right be not by reason of possession, but by licence, agreement, &c. such a mode of pleading will be faulty (*b*). And thus, where the plaintiff, claiming a right to a water course, declared on his possession ; but it appeared, that the defendant, although he had agreed to let certain land to the plaintiff, never executed a conveyance, the court held, that the plaintiff could not be said to have this right to the water by reason of his possession, and the rule was made absolute for a nonsuit to be entered (*c*). The word "way", it seems, cannot be understood by "passage", for, upon demurrer, the court said, that *passagium* was properly a passage over water, and not over land, and that the usual words known in the law ought to have been observed (*d*).

The *termini* of the way should be set out, and in this respect, as we have before seen, a private way is pleaded differently from a public way (*e*). It is, therefore, usual to add, "from and out of, &c. unto, into, through, and over a certain close, &c. and from and out of the same unto and into, &c." [wherever the way leads], and so back again. *Termini.*

Thus, it was very early agreed, that a way should be shewn to pass from such a place to such a place, as from one close to another, from a house to a close, &c. (*f*) And the reason is, because a man may not go over the grounds of another but to the right place (*g*). The same doctrine was adopted, where the right claimed was a way for the purpose of carrying home tithes in

(*a*) 3 Lev. 266, Winford v. Wollaston. S. P. 2 Ventr. 185, Warren v. St. Hill. 1 Ventr. 274, St. John v. Moody, where such pleading was held good after verdict, though Twisden, J. doubted if it could be so on demurrer, but the above case of Rider v. Smith has set the matter at rest. S. C. 3 Keb. 528. 531. S. C. 2 Lev. 148.

* Where the plaintiff said, that he *had* a way, but that the defendant erected a wall, so that he could not have his way, the writ was held to be repugnant, for stating first, that there was a way in possession, and then, that the way could not be enjoyed. By Prisot, 33 H. 6. 26.

(*b*) See 2 Chit. on Pleading, p. 405.

(*c*) 4 East, 107, Fentinan v. Smith.

(*d*) Yelv. 163, Alban v. Brounsall. 1 Brownl. 215, S. C.

(*e*) See the judgment of Wilson, J. 1 H. Bl. 355 ; but, by Gould, J. "in pleading a right of way you need not describe the *terminus a quo*, because the plaintiff may reply *extra viam*, which will be a matter for evidence." 3 Wils. 273. This, however, was an *obiter dictum*.

(*f*) 39 H. 6. 6.

(*g*) Hob. 190. See Hutt. 10. Coble v. Allen.

kind (*a*). So even in the case of a way in gross, it ought to be alleged in certain, and not in one place to-day and in another to-morrow; for it should be bounded and circumscribed within a certain space (*b*). Where, therefore, the plaintiff declared, that the lord of the manor had, for himself and his customary tenants a certain highway, without saying to what village it led, judgment was arrested (*c*). If, instead of leading to a common highway, the way in question lead to a private close, it becomes necessary to state some interest which the plaintiff has therein (*d*). Though, where a nuisance was alleged to have been committed by stopping a way unto a field, (which was named in the declaration,) the court said, they would intend it to be a common field, but that it would have been otherwise had the words been, "to such a close." (*e*)

So, where the plaintiff prescribed that the inhabitants of *C.* had been used to have a common cross way, and that he was an inhabitant of *C.*, it was held, that he should have judgment notwithstanding the objection that *C.* was not stated to be an ancient town, for the plaintiff did not claim any right or interest in the cross way, but only an easement (*f*). One prescribed to have a cross way in a certain way unto such a close in *D.*; and it was objected, that inasmuch as this should be intended to be a common cross way and so of common right, the prescription was gone. But it was adjudged, that although a man could not prescribe in a common cross way without more, yet to have a way in, by, and through that common cross way, he might well prescribe; for, notwithstanding that being in the highway he might continue his course without prescription, yet the cross way might be inclosed and hedged on both sides, and then to prescribe to pass, cross, and repass through would be a good prescription (*g*).

Where, in pleading a way, a highway is alleged by way of abuttal, it need not be shewn *from what vill to what vill* such highway leads. As where a way was stated to be from a house to a meadow, that is, from a house *to a highway leading from* T. *unto a bridge*, and when at the bridge, turning into the defendant's close, and thence into the plaintiff's close. Here the highway was not the matter of justification, for then the *termini* must have been shewn; but the plaintiff only mentioned it as an abuttal

(*a*) 2 Leon. 10.
(*b*) Yelv. 164.
(*c*) 1 Brownl. 6, Alyns v. Sparks. But now, *after verdict*, such an objection would not prevail. See 8 East, 4.
(*d*) Noy, Rep. 86.
(*e*) Ibid. Parke v. Stewsam. Latch. 160, S. C.
(*f*) Noy, 120, Stone v. Wakeman.
(*g*) Noy, 9, Banning's case.

of his way, to lead him on towards the final statement of his right (*a*).

However, after verdict any error by omitting the *termini* will be cured. And so, where it was found, that the plaintiff had a way over the place where, &c., it was said not to be material to the justification, that it should appear whither the way led, it being after a verdict, and the right of the case having been tried (*b*).

It is not always prudent to use the word "*unto*" the close to which the way leads, for if a close intervene, over which the right of way does not extend, the plaintiff will be liable to a nonsuit. An action was brought for obstructing the use of a way, and the declaration alleged the way as being from such a piece of land, into, through, and over a certain other piece of land of the defendant *unto* the village of *A.* and so from thence back again, &c. It appeared, that a close, over which the way once led, and which adjoined to the village of *A.* had been conveyed over in fee, without reserving the right of way, which consequently became extinguished, or, at all events, suspended, and the court held, that the plaintiff could not recover (*c*). Yet it was said, that he might still have a prescriptive right over the defendant's close *towards* the village of *A.*, and that, as an easement could be claimed by prescription in the same manner as it might be holden by grant, the plaintiff might have succeeded, had he adopted the latter mode of pleading. Because, "if there were several closes belonging to different owners lying between the two *termini*, a grant of a right of way over each might have been obtained from the several owners at different times (*d*). Nevertheless, if the intervening close be in the possession of the party himself, who claims the right of way, the case is different. Thus, where the defendant prescribed for an occupation way from his own close unto, through, and over the said several closes, in which, &c. to, and unto a certain highway, and from thence back again, &c.; and it appeared, that one of the intervening closes was in the possession of the defendant himself, the court were of opinion, that the prescription had been duly proved, for the defendant had in fact a right to go the whole line of way from the one *terminus* to the other (*e*). In Wright v. Rattray the prescription stopped short of the village of *A. unto* which it was claimed by the declaration. It was said in one case by Mr. Justice Doderidge, that if a man had a way from his house to the

(*a*) Palm. 420, Harrison v. Rooke.
(*b*) 1 Ventr. 13, Clerke v. Cheney.
(*c*) 1 East, 377, Wright v. Rattray.
(*d*) Verba Lord Kenyon, C. J. Id. 382.
(*e*) 1 East, 381, Jackson v. Shillito, cited there.

church, and the land next to his house was his own close, he could not prescribe that he had such a way, inasmuch as he could not prescribe in his own land (*a*). The other judges differed from him, and the last case cited is in opposition to this opinion, for if the principle of that decision were, that the person prescribing could go from one *terminus* to another, as stated by Lord Kenyon, it applies equally to the case put by Mr. Justice Doderidge. And in a case where the plaintiff claimed common of pasture over a certain common field, part of which he occupied as a proprietor, it was considered unnecessary for him to except his own land out of the right claimed, for the law would except it for him (*b*). This authority seems to confirm the rule mentioned as governing the case of Jackson v. Shillito *. It had, indeed, been very early understood, that a way should be claimed in certain, as to go, or carry, and as appendant to some frank tenement (*c*).

We have seen in a former page (*d*), when speaking of indictments, that the word, "from", in describing a way need not necessarily be exclusive. The same rule applies to declarations. Thus in an action on the case to try a right of way, it was described to be, "from a certain public highway, leading *from* the parish of *L.* to *B.* into, through, and over the defendant's close, &c." It appeared at the trial, that the highway stated as the abuttal of the way claimed, was at that part where this private way joined it *within* the parish of *L.*, and, thereupon, it was objected, that as the word, "from", must be considered as exclusive, there was a variance. The learned judge directed a verdict for the plaintiff. And although it was said, upon the discussion of a rule for entering a nonsuit, that this last could not be the same highway as that stated to lead *from* the parish, Lord Chief Baron Macdonald declared, that he could not entertain a doubt upon the subject, that in strict technical language, "from" is generally held to be exclusive, but that, in common discourse, a way leading *from* a parish, may well be partly in it (*e*). "If pursued, the road will *lead* a traveller *from* the parish. This does not necessarily mean that it commences at the extremity of the parish. The plaintiff has undertaken to describe the highway; but this must be understood with reference to the subject,

(*a*) 2 Ro. Rep. 397, in Slowman v. West. Palm. 388.

(*b*) 1 B. & A. 706, Cheeseman v. Hardham.

* Yet Lord Kenyon cited the opinion of Judge Doderidge with approbation when speaking of Jackson v. Shillito, and observed, that the two judges who differed did not seem to have given a sufficient answer to what he said. 1 East, 382. The reader will be pleased to refer to the two passages in order to form his own judgment. 2 Ro. Rep. 397, and 1 East, 382.

(*c*) Bro. Chim. pl. 7. 45 E. 38, but see, as to the claim of a way as appendant, post, p. 246. See 20 Ass. pl. 18.

(*d*) Ante, p. 222.

(*e*) 2 Anst. 572, Phillips v. Davies.

with such certainty as is requisite in describing an abuttal. The defendant has here a sufficient notice of what he has to oppose, and that is all that he can require." (*a*)

From the foregoing considerations, it has been clearly made out, that some title to the way should be shewn, although it be sufficient to declare upon the possession. Where, therefore, the plaintiff declared in trespass, that the defendant had broken his close, and had taken so many horse loads of gravel, whereby he lost his way, the court held the pleading insufficient (*b*).

What kind of way.

Next, as to the quality of the way, whether it be a foot, horse, or cart way, &c., it is essential that such a description of the right should be stated. An omission to do this will, probably, be bad on special demurrer (*c*), although it would be cured by verdict. Thus, in an action on the case for stopping a way, the plaintiff omitted to state the nature of his way; but the objection not being taken until after verdict, the court disallowed it, observing, that he had prescribed for a way to go and return, and that, after a verdict, it should be intended a general way for all purposes (*d*).

It seems, that it would be sufficient to claim a way for all manner of carriages, without specifying them; but, according to an old case, where a foot and horse way were claimed *pro omnibus et omnimodis carriagiis*, it was considered that no cart-way could be had under such a mode of pleading (*e*); and the meaning of that case probably is, that as each prescription is *stricti juris*, if a horse-way were claimed, it should be so stated, and the same of a foot-way, and, again, of a carriage-way. And such, at this day, would be the more safe and prudent method to follow (*f*).

Parish or vill.

If the right of way be laid as existing over a private close, the parish or vill where that close is situate, is commonly inserted. In an old case, where the right was said to be over *G.* acre to *S.*, and over *B.* acre to *P.*, but it was not alleged in what vill *B.* acre was, it was moved to arrest the judgment, and the court said, that the objection might have been available on demurrer; but they gave judgment for the plaintiff, as the issue on not guilty had been found for him (*g*).

(*a*) By Macdonald, C. B. 2 Anstr. 574.
(*b*) 2 Ventr. 73, Blake v. Clattie.
(*c*) 8 East, 6. So adjudged. Yelv. 163, Alban v. Brounsall. S. C. 1 Brownl. 215.
(*d*) Com. Rep. 114, Warner v. Green.
(*e*) 3 Leon. 13, Anon. 4 Leon. 167, S. C. Id. 224, S. C.
(*f*) See ante, p. 224.
(*g*) Noy, Rep. 9, Banning's case. S. C. Cro. El. 427, by the name of Bragg v. Banning.

It seems, however, to be sufficient to mention some parish within the body of the county, without strict proof of the local situation; for it was determined, in the cases of the Irwell watercourse and the Thames Wharf, that it was enough to shew what the property injured was, and that it was so injured by the defendants, and the manner of stating the place where the respective injuries happened should rather be referred to the venue, than to local description (*a*).

Appendant. In the present forms of pleading, it is customary to state, that the way claimed is appurtenant to the premises, that is to say, where the easement in question is appurtenant, for, if it were in gross, or existed by agreement, &c., this mode would, of course, be irrelevant. However, there are authorities against the statement of appendancy upon any occasion of pleading a way.—As where the plaintiff declared for a disturbance of a way, and omitted the mention of appendancy. The verdict, which was in his favour, found, that the way was appurtenant to the messuages, and the court held, that he should recover, for they said, that the plaintiff shall never lay the way in his declaration, to be appendant or appurtenant, it being only an ease, and not an interest, and they distinguished the case of a common, which is an interest. And it was, moreover, said, that all the precedents were according to the plaintiff's form of pleading, and that a judgment had been reversed in the Exchequer, because the plaintiff had alleged a way as appurtenant to his house (*b*). So, where the plaintiff claimed to have a way from his house to a mill, but did not state that it was appurtenant to his house, an objection was raised upon this ground; but the court said, that such an allegation was properly omitted, that the way was laid to be from the house to such a place, and from the same place back again to the house, and so that the declaration was good (*c*). This allegation, however, may be rejected as surplusage (*d*).

The particular disturbance or injury complained of, by which the plaintiff has been obstructed in the enjoyment of his way, concludes the declaration. But it is not material to set out the means by which the way may have been disturbed (*e*); and it has been so held in the case of a pew (*f*); and the same law was recognized upon the occasion last mentioned, as applying to the interruption of a fair or market (*g*). However, the general mode,

(*a*) 2 East, 497, Mersey and Irwell Navigation Proprietors v. Douglas. 1 Marsh. 363, Hamer v. Raymond.
(*b*) Yelv. 159, Godley v. Frith.
(*c*) 1 Bulst. 47, Pollard v. Casy.
(*d*) 1 Lord Raym. 75, Lawton v. Ward.
(*e*) Chit. on Pleading, Vol. II. p. 406.
(*f*) Cro. Jac. 606.
(*g*) Cro. Jac. 605, Dawney v. Dee.

not stating the particular obstruction, may well be the subject of a second count. The plaintiff declares, that in consequence of the disturbance, he has been unable to use his way as he otherwise would. For want of this statement judgment was arrested in an old case, because it was not shewn, that the plaintiff had suffered any particular damage or loss by the stopping complained of (*a*).

Bridge.

Although not of common occurrence, an action on the case may be maintained for the disturbance of a private bridge. And here, it seems, that the way need not be stated as leading to any frank tenement. For where the plaintiff declared that the defendant ought to repair a bridge over a certain stream, by which bridge the plaintiff, &c. and all those whose estate he had in a manor, by reason of the manor, had used to pass, &c., it was held, that he had shewn a good title, without saying, that he had the way to any frank tenement or other place certain (*b*). For when he should have passed the bridge, he might have gone whither he would, and, if it were to his profit or disadvantage respectively, might have thrown the baskets he was carrying on the ground, or proceeded on his journey without them (*c*). The bridge in question led to a mill, and it was the custom to carry victuals and other necessaries over it.

Other declarations.

The declarations above mentioned have been introduced for the purpose of inserting some points of pleading applicable generally to the subject. There are many other declarations for disturbances or of obstructions of ways, as (to name a few merely for examples,) by a rector for obstructing his way which he is accustomed to use when taking his tithes in kind; against a rector for not repairing a cart-way to which he is bound by prescription in respect of his glebe; against a defendant for not pulling down a bridge over which the plaintiff has a right of way, &c. (*d*)

An action was brought to recover damages for the breach of an agreement to complete the purchase of certain premises which the defendant had purchased at a public sale. In the particulars of sale, amongst other things, a certain right of cart-way had been included. The declaration did not state that this right of cart-way appertained to the premises alluded to in the agreement, and, it was therefore contended, that the whole being an entire purchase, should have been set out in the declaration. But Lord Kenyon overruled the objection;—he said, that the material point, and that upon which the plaintiff's action was grounded, arose on the purchase of the foundery, house, &c., and that the

(*a*) Noy, Rep. 120, Stone v. Wakeman.
(*b*) 11 H. 4. 83.
(*c*) Ibid.
(*d*) See Precedents. 3 Chit. Pleading, p. 444. 8 Wentw. 511, *et seq.*

right of way was an easement merely annexed to the house and foundery, and needed not to have been stated (*a*).

Covenant.

In an action of covenant, the plaintiff set out an indenture, by which his lessors covenanted that he should, from time to time have "the free use and benefit of the *new intended road whenever the same should be made*", &c. The defendant pleaded, that the road mentioned in the indenture had not been made. It appeared in evidence, that there had been an agreement for a lease, that four years had elapsed between the execution of the lease and the making of that agreement, that the road in question, originally intended when the agreement (which corresponded with the lease) was made, had been completed before the execution of the lease. Upon this, Gibbs, Chief Justice, although he refused to nonsuit the plaintiff, said, that the deed spoke of a road which was not in existence at the time of making the indenture, and that the covenant could not apply to a road which was in existence before the lease was made. A rule to enter a nonsuit was, subsequently, made absolute, though the court said, that the plaintiff would be relieved in equity (*b*).

Use of a way.

Indebitatus assumpsit may be maintained for the use of a way. The plaintiff declares, that the defendant is indebted to him for the use of a way enjoyed at the defendant's request, and by the plaintiff's sufferance, and that, being so indebted, the defendant, in consideration thereof, promised, &c. (*c*)

Assise and *quòd permittat.*

The remedies by assise and *quòd permittat* being now, for the most part, obsolete, and, indeed, superseded by the action upon the case, it does not appear to be necessary to enter upon a fuller consideration of them in this place (*d*).

Joinder in action.

Although the rules as to joinder in action do not vary in the case of ways from any other suit, it may not be amiss just to mention one or two cases which have occurred upon the subject which we are discussing.

A wife, before marriage, was possessed of a lease for years of a close, and both husband and wife joined in an action on the case for hindering a way to the close. It was objected, that the wife had joined in the action with the husband during the coverture, which ought not to be; but, because the wrong was done to the wife, and the husband had the close in right of her, the court disallowed the exception (*e*).

(*a*) 1 Esp. 184, Thompson v. Miles.

(*b*) 5 Taunt. 548, Crisp v. Price, Bart. See also on the subject of the action of covenant, 2 B. & P. 18, Browning v. Wright.

(*c*) See 2 Chit. on Pleading, p. 89.

(*d*) See instances of the *quòd permittat*, 45 E. 3. 8. 30 H. 6. 7.

(*e*) Cro. Car. 418, Baker v. Brereman. See 3 Term Rep. 627.

The first count of a declaration stated an agreement in writing, that the plaintiff should build a yard in the defendant's close, laying out so much money, and that the plaintiff should enjoy it for his life. The plaintiff averred that he did build the yard, and that he enjoyed the same for some years as an easement, and then assigned as a breach, that the defendant obstructed him in the enjoyment of his easement. A count in trover was added. An objection was made, that the first count sounded only in contract, and that the last, being in case for trover and conversion, which is a tort, could not be joined with the other. But the court were of opinion that the counts were well united, and that the first count was founded upon tort, and not upon contract, and judgment was given for the plaintiff (*a*).

Of pleas.

We come now to pleas, considered as defences, or answers to declarations, as far as they respect rights of way, and these, like declarations, are very numerous, and applicable to a variety of occasions. But the principal subject with which we have to deal is the mode of pleading a public, and a private right of way *. And here it should be premised, that whoever will plead an easement must plead it specially. It was so decided where the plaintiff complained of the defendant for having nailed trees to the back of the plaintiff's wall, and the defendant had pleaded the general issue only (*b*). And by Gould, Justice, "suppose the wall falls down, it being the plaintiff's property and fence next to defendant's close, the plaintiff must rebuild it, or the defendant might have an action against him." (*c*) And, upon a question, whether upon not guilty the exercise of a highway could be given in evidence, Willes, Chief Justice, declared the opinion of a majority of the judges, that it could not be done (*d*). After reciting the trespasses, a plea of a public right of way states the general easement as it in reality exists. The nature of the way is shewn, as we have mentioned in the case of a declaration (*e*), but care must be taken to adhere to an accurate description of the privilege claimed (*f*), for if it be not a way for all purposes, the plea must be qualified according to the truth of the case (*g*). To trespass for breaking the plaintiff's close, it was

(*a*) 3 Wils. 348, Mast v. Goodson.

* "In some cases where a justification is pleaded it may be advisable not to plead the general issue; thus, in trespass *quare clausum fregit*, if the plaintiff's possession cannot be disputed, and the defendant rely upon a right of way, it is better not to plead the general issue, in order that the defendant's counsel may begin at the trial, and that thereby, in case the plaintiff examines any witnesses in chief, the defendant's counsel may have the advantage of the reply." 1 Chit. on Pleading, p. 503.

(*b*) 2 Wils. 173, Hawkins v. Wallis.

(*c*) Ibid.

(*d*) 7 Mod. 301, Selmon v. Courtenay.

(*e*) Ante, p. 245. 8 East, 6. And see also ante, p. 224.

(*f*) See 4 Camph. 189.

(*g*) 2 Chit. on Pleading, p. 613.

pleaded, that there was a common and public highway for persons to pass along at pleasure, upon the payment of a certain toll, but it was not said to have been an immemorial toll, and, therefore, the plea was considered neither to be inconsistent nor contradictory, for the highway might have been created by act of parliament (*a*). Again, supposing that the way should, at certain seasons, be rendered impassable by floods, the plea need not state an exception of those times (*b*), for the allegation, that a person has a right to do anything at all times, at his free will and pleasure, necessarily embodies in itself a tacit exception of those times at which the doing of the thing is rendered impracticable by natural events, whether ordinary or extraordinary (*c*).

Termini.

The *termini* of a *public* way need not be stated in a plea. An action was brought for breaking the plaintiff's close, and the defendants justified, by saying, that the place, in which, &c., had been from time immemorial a public common highway, for all the king's subjects to pass and repass, on foot, from another highway leading from Knightsbridge unto a place called E. Court, in the parish of Kensington, through, over, and along the plaintiff's close, unto another highway leading from London to Fulham, and back again, &c. The evidence to sustain this plea was, that the way in question led over the plaintiff's close into *a footway called O. Lane*, at the west side, *and along that footway, into the road leading from London to Fulham.* The judge who tried the cause *, thinking that this variation from the plea was fatal, directed a verdict for the plaintiff. But the other judges of the Court of Common Pleas † were of opinion that a rule for a new trial should be made absolute (*d*). Mr. Justice Gould said, that the plea amounted to nothing more than this, that a common highway, which is one entire thing, led over this field to the Fulham road, and that it certainly did so, notwithstanding an intervening piece of ground. It would be productive of infinite uncertainty, added the learned judge, to require an exact description of the line of the way, to say that it went so many yards to the north, then turned to the west, and then to the east, in that irregular manner. The usage defines the way. "I have always understood that the intermediate spaces are disregarded, both as to the approach to a field and the quitting it. It is sufficient to answer the trespass, and justify under a right to pass over the close." (*e*) By Mr. Justice Wilson—"The objection in this case is, that the way is stated

(*a*) 8 Price, 535, Sutcliffe v. Greenwood.
(*b*) 3 B. & A. 202.
(*c*) Ibid. per Abbott, C. J.
* Lord Loughborough.
† Gould, Heath, Wilson, Js.
(*d*) 1 H. Bl. 351, Rouse v. Bardin.
(*e*) By Gould, J. 1 H. Bl. 354.

to lead to the Fulham road, but that before it reaches the Fulham road, it goes for a little space on another highway. But I do not conceive that to be a material variance. I understand the allegation to import no more than this; namely, that there is a highway over the close, on which you may go from the Fulham road to the Kensington road; but not that the Fulham road joins to the close over which the highway leads. But even if that were the import of the allegation, I should have considerable doubts whether this were a variance. But clearly the allegation means no more than this; there is a highway over the close, leading from the Fulham road to the Kensington road, which I think was sufficiently proved by the evidence." (*a*) Lord Loughborough retained his original opinion. Amongst other observations, he said, "There may be many ways claimed, and the occupier of the field ought to know which is insisted upon; he may admit one, and deny the other; he has a right to reply *extrà viam*, which he cannot do unless the way is explained with defining the term where it commences and ends. In the case before the court, the plaintiff might have admitted the road to the Church Lane; he is deceived by the plea, for he knows there is no road over his field which directly terminates in the Fulham road. But whether the defendant was or was not obliged to describe the way so particularly, he has undertaken to do it, and has not done it truly; a way terminating in the Church Lane, and a way terminating in the Fulham road, are not only distinct, but it is physically impossible they can be the same. If the road were a line drawn from the Knightsbridge to the Fulham road, the line actually taken into the Church Lane must of necessity be *extrà viam*, and so *vice versâ*. To state generally a right to cross a field without any given direction, seems to me so uncertain, that it is impossible to meet it with precision, either in replication, or on traverse of the plea." (*b*)

The learned Chief Justice, whose opinion has just been inserted, relied on a passage in Rolle's Abridgment (*c*), where it is said, that in an indictment for an obstruction, or nuisance, near a highway, it is necessary to set out the *terminus à quo*, and the *terminus ad quem*. But this position is not consistent with subsequent authorities, and in the year before the decision of the last case, some very strong observations were made in the Court of King's Bench upon the propriety of pleading a public highway generally (*d*). A stranger, by way of example, could not be supposed to be cognizant of the highway in particular, over which he might have a right to pass, and the distinction between private and public ways was put thus strongly in argument. "The former only arise by grant or prescription, and the party

(*a*) 1 H. Bl. 355.
(*b*) Id. 357.
(*c*) 2 Ro. Ab. 81.
(*d*) 3 Term Rep. 266.

claiming them, having the possession of the deeds or other evidence of the right, must shew a title in pleading. But this would be impossible in the case of a public highway, where a stranger cannot be supposed to be cognizant of the origin of it. It is sufficient for him that it is a highway at the time." (*a*) So again in Ventris: "One that justifies for a way, if he alleges the place from whence, and to which, and that it leads over the place where, 'tis sufficient, though he *mistake the other mean* passages of it." (*b*)

However, if a defendant will state the *termini* in his justification, he is bound to prove them (*c*).

The plea proceeds then to state the user of the way, and to justify the acts of which the plaintiff has complained, doing no unnecessary damage, &c. This allegation, that no unnecessary damage has been done, is the usual mode of pleading, but where the defendant pleaded to trespass, that a house had been built across his way, whereupon he pulled down the walls, which rolled into the sea, it was held, on demurrer, that when a man has a right to abate a public nuisance, he is not bound to do it orderly, and with as little hurt in abating it, as can be; and therefore was not answerable in this case for the rolling into the sea (*d*). In pleading a public highway, it has been adjudged good to say, that in the close, where the plaintiff supposed the trespass to have been, there had been a footway immemorially for all the king's subjects, that the plaintiff ploughed up the footway, sowed it with wheat, but left and assigned another footway near the ancient way, within the same close, and that the last mentioned had accordingly been used by all foot passengers (*e*).

Private ways.

Private ways are claimed either by prescription, by grant, or of necessity, which latter, when considered, is nothing more than a way by grant. We will advert to pleas applicable to each of these three cases.

By prescription.

Upon this occasion of pleading a private way by prescription, it is observable in the first instance, that the defendant must not be content with alleging his possession, but that he must fully set out his title to the premises in respect of which he claims his right (*f*). And, therefore, he states a seisin in fee, (if the case be so,) and an immemorial enjoyment of the road in question; he mentions, moreover, the nature of the way, and the *termini* of it, and commonly declares it to be belonging and appertaining

(*a*) 3 Term Rep. 266.
(*b*) 1 Ventr. 13. See also ante, p. 221, &c. p. 241, and 7 B. & C. 414.
(*c*) By Gould, J. 1 H. Bl. 354.
(*d*) 2 Salk. 458, Lodie v. Arnold. See Cro. Car. 184.
(*e*) Yelv. 141, Horne v. Widlake. See Willes, 282.
(*f*) 3 Term Rep. 766, Rider v. Smith.

to his close, or messuage. He then states the user of this way, and lastly, concludes by justifying the supposed trespasses alleged in the declaration.

With regard to a man's prescribing for a way in his own land, the reader is referred to a former page, where the authorities are mentioned (*a*).

The words of the plea which mention the persons entitled to the way, are usually these: "his and their servants, farmers and tenants, *occupiers*, &c." The defendant may sustain a plea having these expressions, although his messuage, to which the right of way belongs, be in the occupation of a tenant, and although he do not allege himself to be an occupier. Thus, a defendant pleaded to trespass *quare clausum fregit* 1st, Not guilty. 2dly, A public right of way. 3dly, A private right "for himself and themselves, and his and their farmers and tenants, occupiers," &c. The plaintiff took issue on these pleas; it appeared that the defendant had let the messuage, to which he claimed the easement as appurtenant, to a tenant who was in the occupation of it at the time of the trespass, and that he had built a new house on a different part of the same estate for himself, which he was occupying at the same time. Upon this, the plaintiff contended, that the justification could only apply to the new house occupied by the defendant, and not to that in the occupation of his tenant; but the cause proceeded, and he had a verdict on the plea claiming a private right of way. After a laborious argument in support of a rule, either to enter a verdict for the plaintiff on the special plea in question, or for arresting the judgment, the court held the pleading sufficient. The plaintiff might have replied the fact by way of new assignment, that the defendant had let his messuage, and was only the occupier of a newly-built house, and that the pleadings might have been brought to the issue for which the plaintiff was contending, or he might have obliged the defendant, by a proper application, to state in respect of which messuage he claimed the right of way. He should have admitted the claim, and pleaded that there was a new house, and that the trespass complained of was committed *extrà viam*, and in the way to the new house (*b*). After the judges had expressed their opinions to this effect, the plaintiff's counsel still insisted, that the pleas should have gone farther, and have alleged, that the defendant was the occupier of the messuage and land, in right of which he claimed the prescription in order to bring him within the prescription, which was for occupiers only. But the court answered this, by saying, that the allegation of seisin implied occupation, until the contrary were

(*a*) Ante, p. 244.
(*b*) 16 East, 343, Stott v. Stott.

shewn in pleading, and that if the plaintiff intended to insist upon that fact, he should have replied, that the occupation was in another (*a*).

There is another case upon occupation, regarding rights of way, which, although the point arose upon a declaration, may be properly introduced here after the former decision. The plaintiff declared upon his possession and occupation of a messuage, &c., and claimed a right of way for himself and his servants over a certain close of the defendant to his own messuage and land. At the trial he called a witness, who stated himself to be a labourer in the service of the plaintiff, and said, that the messuage above mentioned (which was a cottage) was divided into two parts, one of which he occupied; that he paid no rent, but had less wages by 5*l.* a-year, on account of his paying no rent in money, and was only a weekly servant. It was objected, that this was not the plaintiff's occupation, but that of a tenant, and the plaintiff was accordingly nonsuited. However, it was moved to set aside this nonsuit, and the Court of King's Bench were quite clear, that, upon this occasion, the occupation of the servant was virtually that of the master, and that the servant did not stand in the relation of a tenant to the premises. The rule was, consequently, made absolute (*b*). It should be observed, that if the servant had paid rent in this case, the declaration would have been faulty, because the plaintiff could not then be said to have occupied his premises, and the servant's occupation could not have been identified with that of his master. The difference between the two cases is, that in the former, the seisin in fee, *not being denied*, drew to it all the rights annexed to such a seisin, and it was admitted, therefore, on the record, that the defendant was seised in such manner as to be entitled to a right of way, if the right of way existed (*c*). And, in the other cases, Lord Ellenborough said, "If the man had been in the occupation of it [the cottage] before, as a tenant paying rent, I should have thought that he still continued to occupy it in that character, if no new agreement had been entered into in that respect when he was taken into the plaintiff's employ, and that he was only to pay his rent in service instead of money. But no rent had ever been paid by him before, nor did he ever stand in the relation of tenant to the plaintiff." (*d*)

But where in an action upon the case for stopping a way, the plaintiff claimed the easement as lessee of the Company of Haberdashers in London, and claimed the way *for them*, it was held,

(*a*) 16 East, 351, in Stott v. Stott.
(*b*) Id. 33, Bertie v. Beaumont.
(*c*) See id. 349, by Lord Ellenborough.
(*d*) Id. 36.

that the company, having let the premises in respect of which the way was demanded, could not have it; and that, if any prescription were made, it should have been for the tenants and occupiers of the company's premises. As the declaration was laid, the company ought to have brought the action (*a*).

The propriety of stating the way to be appendant to some messuage, &c. has already been discussed in treating of the manner of declaring for obstructions (*b*).

Persons entitled.

It should be remarked, that certainty is required in setting out a right of this kind; and that the persons, or the description of persons entitled to it should be accurately mentioned. Therefore where a count in a declaration * stated a seisin in fee in the plaintiff of an ancient messuage, that the only way for persons travelling in carriages from that messuage to *B.*, was over the defendant's closes, &c.; and that the plaintiff, and all those, &c. had been accustomed immemorially to enjoy the way in question for himself, and themselves, and *others*, travelling in carriages from that messuage to *B.*, &c.—it was holden bad for uncertainty. For it was too general to urge a right for the plaintiff, and *others* (naming no persons) and by no means certain enough for a prescription (*c*).

Quantity of way.

It was said by the court, in an old case, that the quantity of this close over which the right of way was claimed needed not be shewn in pleading, but that the quantity of the way, as so many feet, &c. should be stated (*d*); this course, however, is not adopted at the present day, the easement being mentioned generally as a right of way. And the close being once mentioned, must be shewn in evidence to be that in respect of which the right is claimed. So that where the defendant made his prescription for a way to Badsley-well-close, it was held, that he could not justify the going over another close called Warton Langdale, and judgment was given for the plaintiff (*e*).

Termini.

The *termini* of a private way should be set out in a plea with as much correctness as possible; for, as we have before seen, although this accuracy may be dispensed with in the case of a public way, it is otherwise when a private right comes to be pleaded. Those cases, therefore, which go the length of saying

(*a*) Sty. 300, Cantrell v. Stephens.
(*b*) Ante, p. 246.
* We have placed this case under the head of pleas, because the plaintiff thought fit to set out his *title*.
(*c*) Willes, 71, Chichester v. Lethbridge. 2 Lev. 178, Underwood v. Sanders.
(*d*) 39 H. 6. 6. Bro. Chim. pl. 6, cites S. C.
(*e*) 1 Lutwy. 111, Laughton v. Ward.

that the way need not be stated as extending from such a place to such a place, cannot now be supported. Thus, where one prescribed that he, and all those, &c. had been used to have a way by and through the pound garden unto the sessions, and from the sessions by and through the pound garden, without saying from or to any house, it was moved in arrest of judgment, that such pleading was insufficient; but by Doderidge, J., "it signifies not whether he had the way from or to the house, or not;" (*a*) and in support of this he cited two cases from the year books (*b*). And, lastly, it is desirable to observe, that the justification must answer the whole trespass *as laid;* for where the plaintiff complained of the defendant for going over a close with horses, cows, and sheep; and the defendant justified by reason of his having a way for horses, cows, and sheep, whereupon he went over with *horses,* the plea was holden ill on demurrer, inasmuch as the justification was for *horses* only (*c*).

Plea of right of way by copyholder.

When a copyholder pleads his right of way, he alleges, that there is a custom within the manor for every customary tenant of the customary tenement which he holds, and which, as well as the *locus in quo,* he has previously stated to be parcel of the said manor, to have the way in question, (setting out the *termini,*) for himself and his servants, &c. He then goes on to shew the user of this way, and concludes in the usual manner.

The place in respect of which the way is claimed must appear to be within the manor, and a positive affirmation of the custom is necessary. The defendant pleaded to trespass *quare clausum fregit,* that the manor of *C.* was an ancient manor, and that there was a custom within that manor that each tenant should have a way over the place where, &c. The plaintiff demurred, and had judgment. First, because it was not alleged, that the place where, &c. was within the manor, and thus the custom stated did not extend to it; and, secondly, because the words were, that each tenant *should* have, which is not a direct affirmative to the right, instead of "have had, and still of right ought to have." (*d*)

The expressions "being so seised, and having occasion to use the said way," are very comprehensive, as will appear from the following decision. The defendant, landlord of the premises to which the right of way was attached, pleaded to trespass, that a copyhold tenement had been surrendered to him with all ways then used by the tenants and occupiers of the said tenement, that

(*a*) 2 Ro. Rep. 134.
(*b*) 28 H. 6. 9. 11 H. 4. 83, which see, and also ante, p. 247.
(*c*) 11 Mod. 219, Roberts v. Morgan.
(*d*) 1 Sid. 237, Cornelius v. Taylor.

the surrenderor was then seised in fee of the *locus in quo*, according to the custom of the manor, that a way was then used by the tenants and occupiers of the surrendered tenement, from thence over the *locus in quo* to a public street; that the defendant was admitted, and continued seised, and *being so seised, and having occasion to use the way*, he committed the supposed trespasses. The replication traversed the way, and there was a new assignment, that the defendant trespassed on the close at other times, and on other occasions than those mentioned in the plea. The right of way was proved at the trial, and there was a general verdict for the defendant; but as it appeared that the premises were in the occupation of a tenant, leave was given to the plaintiff to move to enter a verdict on the new assignment, with 1*s.* damages. And it was contended, upon a motion for this purpose, that the landlord had no right to use the way, whilst his tenement was out on lease, either in order to remove an obstruction, or to assert his privilege; and it was further contended, that the words, "being so seised, and having occasion to use the said way," must mean, that he was then possessed of the tenement, and that he used the way for the ordinary purposes of an occupier in passing over the *locus in quo* in going to and from the tenement. But the court refused the rule; they said, that while the tenement was occupied by the tenant, the landlord might use the way to view waste, or demand rent, or to remove an obstruction; that the language of the plea comprehended all the purposes for which a person seised of the tenement might lawfully use the way; and that the new assignment meant, that the defendant had trespassed on the close for some purpose unconnected with the use of the way claimed in the plea (*a*).

Way pleaded by a particular tenant.

If the way be claimed by a particular tenant, the course is, to shew that such an one is seised in fee of the place to which the easement is appurtenant, that, being so seised, he is entitled to a way, and then to shew the grant to the lessee, for when a particular estate is disclosed in pleading, the fee must be stated to belong to some one (*b*).

Way by grant.

If a way by grant be claimed, the plea must be framed according to the terms of the grant (*c*).

Way by necessity.

Lastly, there is the way of necessity, which is, after all, upon most occasions, nothing more than a way by grant (*d*). The more prudent method of setting forth this right, is, in general, to plead it as arising under a prior existing grant. There are occasions, however, when it may be pleaded merely as a way of necessity,

(*a*) 1 B. & C. 8, Proud v. Hollis.
(*b*) 6 Mod. 4. Selw. N. P. 1343.
(*c*) See 2 Chit. Pleading, p. 624.
(*d*) 1 Wms. Saund. 323, n. 6.

as where the owner of two closes aliens one over which the way lies, having, at the same time, no other way; here the law reserves the original way for him, and excepts it out of his grant. "Where the fact is," says Mr. Sergeant Williams, "that there existed at one period an unity of possession, it must then be claimed as a way by grant. And the uninterrupted use of it for a long time is evidence from which the jury may presume a grant. In which case, in order to dispense with the necessity of pleading the grant with a *profert*, which is generally required, it must be pleaded as a non-existing grant. Otherwise, the case would be attended with an insurmountable difficulty, where the claimant is to set out his right in a plea to an action of trespass." (*a*) In conformity with this doctrine, where a way of necessity was pleaded generally, without the setting forth of any title, the pleas were held bad. For neither unity of possession nor prescription was shewn, whereby the land, over which the way was claimed, became chargeable (*b*), and "as well might it be pleaded without more," observed Lord Ellenborough, "that the defendant had a right to pass over the *locus in quo*." (*c*) However, it should be observed, in the case of pleading a non-existing grant, that the date and the names of the parties to the deed must be shewn, for where a right of common was pleaded in this manner, and the date and names of the persons, as above, were omitted, the court gave judgment against the plea upon demurrer (*d*). It was said in argument, in this last case, that if the experiment of pleading a deed without these forms were to succeed, there would be no more pleas of prescription,—that it would apply to *rights of way* as well as rights of common,—and that there would be no more occasion for pleas of a way of necessity,—and that no question would thereafter arise as to unity of possession, or a release of the right (*e*). It has been said, that it is a good answer to this plea of necessity to say, that the party has another way (*f*); but that it is otherwise where a way is claimed by grant or prescription (*g*). But a very reasonable doubt may be entertained of the correctness of this opinion, namely, that a defence of there being another way would be available, for, as the way of necessity is, in effect, a way by grant, it is difficult indeed to imagine, upon just principles of law, how a way, which arises by grant, can be put an end to, either by unity of possession, or by the existence of another way (*h*).

A right of way for a rector to take home his tithes, is occasional-

(*a*) 1 Wms. Saund. 323, n. 6.
(*b*) 4 M. & S. 387, Bullard v. Harrison.
(*c*) Id. 392.
(*d*) 10 East, 55, Hendy v. Stephenson.
(*e*) Id. 57, by Dampier, arguendo.
(*f*) 6 Mod. 4. 2 Bing. 85, by Park, J.
(*g*) 6 Mod. 4.
(*h*) See ante, Ch. V. p. 72, n.

ly pleaded. Where a parson prescribed for such a way, alleging, that he was seised in right of his church, but omitted to say that he was parson there, it was moved, in arrest of judgment, that the plea was not good. But the court held, that as the clergyman had alleged, that he was seised of his parsonage *jure ecclesiæ*, it was sufficient. Secondly, it was objected, that it was not alleged, in what vill the house was, whereto the way was claimed, for that it might be in another vill. But this objection also was disallowed, because the parson should always be intended to be resident within his parsonage. The *terminus ad quem* was duly set out (*a*).

A right of way is sometimes pleaded, by way of replication, to a plea of defence of possession, in an action of trespass (*b*).

Some issue to be tendered.

In making a plea of a right of way, something traversable, or on which issue may be taken must be tendered, as, for instance, a title, which may be denied by the other side (*c*). To an action of trespass, the defendant pleaded that Sir T. F. was *seised* of a place called Ten Acres, and that he demised the same to the defendant for ninety-nine years, and that Sir T. F., and all those whose estate he had, did, time out of mind, use such a way, &c. The plaintiff replied, *de injuriâ*, &c. Upon this issue a verdict was found, which established the right of way; but it was moved to arrest the judgment, because the plea stated a seisin generally, without saying whether it was for life, in tail, or in fee. To this it was answered, that the jury could not have found the verdict recorded, unless a seisin in fee had been proved, and so it was urged, that any defect in the pleading had been aided by the verdict; and three judges * were of opinion, that the verdict had helped the pleading in this instance, that the seisin in fee, as supposed in the plea, might have been traversed, and that, unless evidence had been given to prove a seisin in fee on the part of Sir T. F., the jury could not have come to a conclusion in favour of the defendant (*d*). And Pratt, J., said, that the plea would have been good, even upon a general demurrer (*e*). The case, however, appears to have been adjourned (*f*).

Denial of way.

There are, of course, proper modes of denying all the rights of way which we have mentioned.—As, in the case of a justification, by pleading a highway, the plaintiff may say, that men have gone this way, sometimes by licence of the plaintiff, and sometimes for

(*a*) Cro. El. 898. Lord Sands v. Pinder. See 1 Bulst. 108.
(*b*) See 2 Chit. Pleading, p. 691.
(*c*) 6 Mod. 4.
* Lord Ch. J. Parker, Powys, J., Pratt, J.—Eyre, J., doubted.
(*d*) 10 Mod. 228, 300, Muston v. Yateman.
(*e*) Id. 302.
(*f*) Id. 303.

their money, without this, that it has been the highway of the king time out of mind, &c. (*a*).

Confession and avoidance.

Sometimes the plea of right of way is answered by a confession and avoidance.—As where the plea discloses a right of way, and the replication admits that right, but avoids it by an allegation, that the plaintiff went out of the way (*b*). So, where the replication confessed the right of way, but added, that the defendant went farther than the close on which the right of way lay, to another close, where he had no such privilege (*c*). And so again, where the defendant pleaded not guilty, together with a right of way, the replication traversed the right of way, and there was a new assignment of *extrà viam* (*d*).

Again, to a declaration in trespass, the defendant pleaded not guilty; and a right of way for horses to go along the close in which, &c. The replication to this second plea was a denial of this easement, and there was also a new assignment, that the defendant entered on the close in which &c., at other times, on other occasions, and for other purposes than those mentioned, and on other parts of the close out of the supposed ways, and also used the ways in another and different manner, and for other and different purposes than the owners and occupiers of the other close were used and accustomed to use the same, viz. with *horses laden with and carrying divers bricks, stone, earth, &c.* In this case, however, the defendant had judgment, as will appear from the sequel of the pleadings. He pleaded to the new assignment, first, not guilty, and secondly, that those under whom he claimed were accustomed to use the ways in question *for all lawful purposes* whatsoever, and that consequently the defendant used the ways with *horses laden with bricks, &c.* The plaintiff pleaded to this second plea to the new assignment, that the owners and occupiers of the said other close were not accustomed to use, and in fact did not use, the ways mentioned, with horses laden with bricks, &c. There was a demurrer to this replication, and upon argument the court gave judgment against the plaintiff, thereby holding the replication to be faulty (*e*). And Best, C. J. intimated his opinion, that the plaintiff should have taken issue upon the plea to the new assignment (*f*).

Sometimes the very words of the plea are denied. As, where

(*a*) 4 Vin. Ab. 520. A denial of the right, following the language of the plea, and concluding to the country is recommended by good pleaders, where it can be done. See 1 Wms. Saund. 103. (c). 2 Chit. Pleading, p. 699.

(*b*) See Hetl. 28, Johnson v. Morris.

(*c*) See 8 Went. Index, p. lvi.

(*d*) 1 East, 350, Martin v. Vallance.

(*e*) 2 Bing. 26, Trickey v. Ycandall. 9 Moore, 55. S. C.

(*f*) 2 Bing. 29.

the defendant justified that he had a way not only to go, ride, and drive his beasts, but likewise to carry with his carts; the plaintiff traversed, without this, that the defendant had a way not only to go and ride &c., in the words of the plea; and upon issue joined, a verdict passed for the plaintiff. In this last case it was objected, that the issue was ill, because it did not contain a direct affirmation, but by an inducement only; but the whole court were of a contrary opinion (*a*).

De injuriâ suâ, &c.

The replication of *de injuriâ suâ absque tali causâ* is not a proper answer to a plea of a right of way; for the prescription itself should be traversed.

Thus, where the defendant pleaded a highway from time immemorial, and that, because the highway was obstructed by a quickset hedge, he cut it up, the plaintiff replied *de injuriâ*, and after a verdict against the defendant judgment was arrested, for the prescription alleged had not been traversed, and therefore there was no proper issue. In this case also the words *absque tali causâ* were omitted; which was said to be another error, inasmuch as the whole case was in issue (*b*). For the plea of a right of way is not merely in excuse, but it claims an interest (*c*).

If the plaintiff have obstructed the defendant's right of way, by setting up a gate or other impediment, and the defendant be called upon to justify the removal of it, it is proper to plead, that because the gate was wrongfully erected across the way, the defendant broke it down, and removed it to a convenient distance from the place where it was erected, and deposited it in a proper and convenient place near to the spot where the gate had been erected *for the use of the plaintiff*. In a case of this kind, where trespass had been brought for breaking down and carrying away an iron gate, there was a plea similar to the above, and the plaintiff's replication was, after protesting that the gate had not been removed to a convenient distance, that after the breaking down of the gate, the defendants *converted the same to their own use*. After a verdict for the plaintiff, the court made the rule absolute for a new trial, since the plaintiff had the power of coming upon the defendant's land to take away his gate without committing a trespass, and as he did not deny the facts stated in the plea, but replied a subsequent conversion, it was incumbent upon

(*a*) Mar. 55, pl. 83, Hicks v. Webbe.

(*b*) Cro Jac. 598, Rex v. Hopper.

(*c*) 8 Rep. 67. Willes, 101. See also 4 Leon. 16, Ruishbrook and Pusanies' case. The prescription claimed a free course for sheep, and was not traversed by the replication, which was consequently held to be bad.

him to prove some trespass which was not covered by the plea, and that, the court were of opinion he had not done (*a*).

Care should be taken to suit the replication to the particular form of action, as will appear from the following case. An action of debt was brought upon a bond conditioned for the performance of articles, by which the defendant agreed with the plaintiff, his heirs and assigns, that they should thenceforth have and use a way through a close belonging to the defendant, in consideration of which the plaintiff agreed to pay the defendant so much, as well as to repair a certain gate between their respective closes, and the defendant covenanted that his son should confirm these articles when he arrived at the age of twenty-one. The defendant pleaded, that his son had not then as yet attained the age of twenty-one, and that he had himself performed all the residue. Then the plaintiff replied, that the son, after the entering into these articles, being the tenant of the close in which, &c, to the defendant, obstructed the plaintiff's way. To this the defendant demurred. The court held, that this replication was wrong, because it did not shew that the son had any title to the close, whereby he might stop this way, and in that case, the injury would be, not a breach of covenant, but trespass, and so, that the action in the form presented to the court was ill conceived. Judgment was, therefore, given for the defendant (*b*).

Duplicity.

Care must also be taken that there be no duplicity in the replications or rejoinders, when a plea of right of way is put upon the record. The following is an instance of such a departure. The defendants pleaded to an action of trespass, not guilty, and a right of way. The plaintiff replied an allotment under an enclosure act, and that he was entitled to stop up the way in question, being one which the commissioner had not noticed, and was, therefore, left to the operation of the general inclosure act *. The rejoinder to this was, that the commissioner did not, in or by his award, order or direct the way to be stopped up, diverted, or turned, or give any orders or directions touching or relating to the same way, or in or by his award set out, or appoint any other way or passage to or from the cottage in lieu or stead of the way in the last plea mentioned. To this there was a demurrer on the ground of duplicity, and the court gave judgment for the plaintiff (*c*).

(*a*) 4 Term Rep 364, Houghton v. Butler.

(*b*) 3 Lev. 305, Holms v. Seller.

* 41 G. 3. c. 109, which declares, that all ways not set out, shal be for ever stopped up and extinguished.

(*c*) 2 Moore, 23, White v. Reeves.

CHAPTER X.

Of Evidence.

In treating upon the subject of evidence as applicable to the law of ways, our first inquiry will be into the competency of witnesses; for instance, of the inhabitants of a parish, a hundred, &c., in the progress of which examination it will be found, that the testimony of some persons is declared to be admissible by virtue of acts of the legislature. The evidence against a parish for the non-repair of a highway will then succeed, together with the proof necessary for their defence. The same inquiry will continue concerning a lesser district than a parish, a particular individual who is charged *ratione tenuræ*, a county indicted for the non-repair of a bridge, and also concerning obstructions in highways.

Next, the evidence needful to sustain a special plea of a public right of way will be mentioned, after which we shall proceed to the testimony requisite upon the trial of private rights of that sort. First, as to declarations for disturbance, declarations in ejectment, &c. The evidence under a special plea of a right of way by prescription, whether by a freeholder or copyholder, will be then laid before the reader; also such proof as will be sufficient to maintain an easement claimed by custom, by a particular tenant, by grant, and lastly, from necessity.

The chapter will close with the matters usually offered to rebut the pleas of rights of way so proved as we have above mentioned.

Who may be good witnesses in proceedings respecting rights of way.

It is a rule of the law, that all persons, who gain or lose directly by the event of a cause, are incompetent to give evidence (*a*). And moreover, if the person be so far interested in the question at issue, as that a bias would probably influence his mind if he were permitted to give evidence, he is incompetent though he do not gain or lose immediately (*b*). Upon these grounds it is, that the inhabitants of a parish, hundred, &c. are in general disqualified from giving their testimony upon proceedings respecting high-

(*a*) Phil. on Ev. 4th ed. Vol. I. p. 124.
(*b*) 10 Mod. 292.

In general, not inhabitants of a parish.

ways. There is this difference between inhabitants who would seek to disprove an obligation to repair roads in their parish, and commoners whose aim it is to establish their rights to pasturage, &c. namely, that in the former case, the inhabitants have an immediate interest in procuring a verdict of not guilty, inasmuch as a record of guilty would be evidence against them upon another indictment; whereas, in the latter, the record would not, in general, affect another commoner, and yet the testimony of both is excluded. The words of Parker, Chief Justice, are very illustrative of the principle in the case of the commoner. He says, "If an action be brought by a commoner for his right of common, shall another person that claims a right of common upon the same title be allowed to give evidence? No: and yet it is certain that he can neither get nor lose in that cause; for the event of that cause will no way determine his right. But though he is not interested in that cause, he is interested in that question upon which the cause depends; and that will be a bias upon his mind. It is not the swearing the thing to be true that gives him any advantage, but it is the thing's being true; and the law does judge, that it is not proper to admit a man to swear that to be true which it is plainly his interest should be true." (*a*) Certain inhabitants of Shoreditch, upon an issue, whether the inhabitants of Shoreditch should repair the highway, offered themselves as witnesses to prove, that some particular persons, inhabitants, had used immemorially to repair; but, inasmuch as, in effect, they were defendants in the information, the court would not receive their testimony (*b*). So, where an information was brought against the defendant for not repairing a highway *ratione tenuræ* between Stratford and Bow, none of the persons who lived in either of the parishes of Stratford or Bow were admitted to give evidence (*c*). So again, a mere inhabitant, not occupying any land within the parish, was considered by Lord Kenyon to be incompetent upon the trial of an issue on a plea by the inhabitants, that one *R.* was bound to repair the road in question *ratione tenuræ*, and this, because, 1st, every inhabitant is liable to do statute-duty, and next, because, in the event of a verdict against the defendants, the witness would have been liable to contribute towards the payment of the fine (*d*).

Again, upon the trial of an indictment at Nottingham against a parish for not repairing a highway, Mr. Justice Bayley held, that a rated inhabitant of another parish, in which it was contended by the defendant that the highway in question lay, could

(*a*) 10 Mod. 292, by Parker, C. J.
(*b*) Mar. 26, pl. 62, Rex v. Shoreditch Inhabitants.
(*c*) 4 Mod. 48, Rex v. Buckeridge.
(*d*) Stark. on Ev. Pt. IV. p. 780, Rex v. Wheaten Aston. See 2 Vern. 317.

not be a witness to disprove that fact (*a*). And where a question arose upon the propriety of suspending the entry of the judgment for the defendants, on an indictment against the parish for a similar misdemeanour, the incompetency of the parishioners was recognized by the court, who imposed, as the condition of staying the judgment, that the parishioners (whose testimony would not be legal evidence on the ground of interest *) should be examined at the next trial (*b*).

Inhabitants of hundred.

Upon the same principle, the inhabitants of a hundred cannot be witnesses. Thus, after observing, that a certain way should be deemed a public way, Chief Justice Parker added, that no one living in a hundred should be allowed to give evidence for any matter in favour of that hundred, though so poor as upon that account to be exeused from the payment of taxes, because, though poor at present, he may become rich (*c*). There was a prescription for a way through a certain gate leading into a common field. A person was called who had an interest in the field, and claimed a way through the gate to his part of the field; and upon his saying, that if the gate were stopped it would be a great inconvenience, he was set aside (*d*). But it has been said, that a man who uses a way, may give evidence whether a toll has been paid, and so it is in the case of a nuisance (*e*). And upon an indictment, charging the inhabitants of *P.* with a liability to repair all roads within their township, it was holden, that an inhabitant of an adjoining township, within the same parish, was a competent witness to prove that the place in question was a common highway; because, although a conviction would discharge the parish, yet there would be this evidence to shew that the road was public, whereby the latter township, from whence the witness came, would be charged (*f*). Where in trespass a witness came to prove a highway, it turned out on the *voir dire* that he was the owner of a field adjoining to the *locus in quo*, and had agreed with the defendant to let him pass across that field at all times, at a rent of 6*l.* a-year for the easement; and that the defendant could not reach the road so assigned, if the *locus in quo* were not a public road. Upon this his testimony was objected to, but Lord Kenyon overruled the objection, and he was examined (*g*).

Toll and nuisance.

(*a*) 15 East, 474, cited by Coltman, arguendo.

* Verba Lord Ellenborough.

(*b*) 1 B. & A. 66, in Rex v. Wandsworth Inhabitants.

(*c*) 10 Mod. 150, by Parker, C. J.

(*d*) 12 Vin. Ab. 14, pl. 50, per Pratt, C. J. Westminster sittings, Pasch. Vac. 1721.

(*e*) By Holt, C. J. 11 Mod. 225.

(*f*) Rex v. Pilling Inhabitants, cor. Holroyd, J. Appen. to Stark. on Ev. 1st ed. Pt. IV. p. 673.

(*g*) Peake, N. P. Cases, 18, Pollard v. Scott.

Prosecutor of indictment competent.

But, it seems, that the prosecutor of an indictment for non-repair is a competent witness; a person in that situation has been sworn, and no objection was taken to his qualification when examined in support of the prosecution (*a*). "Though the court is authorized to award costs against the prosecutor in case the proceeding shall appear to have been vexatious, yet the court would scarcely presume, in the first instance, that the prosecutor's conduct had been vexatious, so as to raise an objection to his competency, especially after the finding of a bill by the grand jury." (*b*)

Inhabitants of county admissible on questions as to the repair of bridges in the county.

The inhabitants of a county are admissible witnesses upon indictments for not repairing bridges within the county. They were considered to be competent in early times from a principle of necessity, though the rule was by no means universal *. And so it was held, that if a man were indicted for the non-repair of a public bridge, to which repair he was bound by reason of his tenure, those of the county might be witnesses, because none else could testify concerning the matter (*c*). And the same opinion was advanced by Dolben, J., who said he had known such an admission in the case of Peterborough Bridge (*d*). The inconvenience, indeed, of a contrary doctrine, which, it seems, prevailed upon many occasions, was so seriously felt, that the legislature interfered. The preamble to the act for establishing the testimony of such persons sets forth, that whereas many private persons, bodies politic or corporate, are obliged to repair decayed bridges, and the highways thereunto adjoining; but because the inhabitants of the county, riding, or division where the bridges lay, had not been allowed, upon indictments or informations, to be legal witnesses by the judges before whom such indictments or informations were tried; therefore the act proceeds—in all indictments or informations in any of her Majesty's courts of record at Westminster, or at the assises or quarter sessions, the evidence of the inhabitants, being credible persons of the town, corporation, riding, or division, in which the decayed bridge or highway lies, shall be admitted (*e*). And so, subsequently to the passing of the statute, it was said, that one of the county is a good witness in the case, [for repairing a bridge,] though not a good juror (*f*).

If this latter class of witnesses, however, thus sanctioned by the provisions of the legislature, be not an exception to the ge-

(*a*) 1 Stark. 358, note (a), in Rex v. Hammersmith Inhabitants.
(*b*) Ibid.
* See the preamble to the statute of Anne, *infrà*.
(*c*) 2 Show. 47. See 2 East, 561.
(*d*) 1 Ventr. 351.
(*e*) 1 Ann. st. 1. c. 18. s. 13.
(*f*) 6 Mod. 307. See post, Ch. XI. as to the trial.

neral rule, those acts of parliament which authorize the inhabitants of parishes to give their testimony in cases of forfeitures, and which permit the evidence of trustees of turnpike roads, of surveyors, and of collectors to be received, certainly recognize that exception. These enactments shall now be presented to the reader's attention.

Inhabitants when good witnesses.

The highway act declares, after pointing out the mode of recovering penalties, that any inhabitant of any parish, township, or place, in which any offence may be committed contrary to the act, shall be deemed a competent witness notwithstanding his or her inhabitancy (*a*). A similar provision is made by the turnpike regulations (*b*).

Surveyor of highways.

So again as to the surveyor of highways. The surveyor of any parish, township, or place, shall be deemed, in all cases, a competent witness, in all matters relative to the execution of the act, notwithstanding that his salary may arise in part from the forfeitures and penalties inflicted by the act (*c*). The surveyor may also be a witness for the defendants (*d*).

Trustees of turnpike roads.

Trustees of turnpike roads, mortgagees, or creditors of the tolls, farmers, lessees, or collectors, treasurers, surveyors, and other officers appointed under any turnpike act, are made competent witnesses by an express provision for that purpose. For it is enacted, that no person shall be deemed incompetent to give evidence, or be disqualified from so doing in any action, suit, prosecution, or other legal proceedings at law or in equity, or before any justice, by virtue of any turnpike act, by reason of his being a trustee, &c. as we have just mentioned; nor shall any testimony or evidence for any of the reasons aforesaid be rejected or liable to be questioned or set aside (*e*).

Collectors.

With regard to collectors, there is a separate and independent enactment. For the statute declares, that in case any dispute, suit, or litigation, should arise touching the tolls granted by any act of parliament, the persons appointed to collect the same, or any persons appointed by the authority of the trustees or commissioners, shall not be incompetent to give evidence upon such occasions on account of their appointment as collectors (*f*).

Actions against trustees.

To sue a trustee of a road successfully, proof of his appointment, and of his having acted as such will be sufficient. Thus,

(*a*) 13 G. 3 c. 78. s. 77.
(*b*) 3 G. 4. c. 126. s. 137.
(*c*) 13 G. 3. c. 78. s. 69.
(*d*) Archbold's Criminal Pleading, 3d ed. p. 116.
(*e*) 4 G. 4. c. 95. s. 84.
(*f*) 3 G. 4. c. 126 s. 59.

if an action be brought *against* any trustee or commissioner of a turnpike road, evidence of his having acted as such, together with the act of parliament containing his appointment, or the order, or a copy of the order for his appointment or election, in case he have been appointed or elected by the trustees or commissioners, shall be sufficient proof of his being a trustee or commissioner (*a*).

Having now set forth the authority upon which the testimony of particular persons may be received in disputes regarding public rights of way, we proceed to mention the particular evidence which is requisite for the support of indictments, and of a claim for rights of way generally. But before we do this, there are one or two points, regulated by act of parliament, which it may not be amiss to introduce in this place.

Penalty on witnesses not attending summonses under the turnpike acts.

There is a penalty upon all persons summoned as witnesses under the turnpike acts, who do not attend pursuant thereto. Thus, if any person, after having been paid or tendered a reasonable sum for his expenses, shall be summoned as a witness, to give evidence before any justice, touching any matter of fact contained in any information or complaint for any offence against any turnpike act, either on the part of the prosecutor, or the person accused, and being so summoned, shall refuse or neglect to appear at the appointed time and place without a reasonable excuse, he shall forfeit a sum not exceeding 40*s.*, and the same penalty is inflicted upon any one, who, after having appeared, shall refuse to be examined upon oath, and give evidence before such justice, a reasonable sum for his expenses having been first paid or tendered (*b*).

Books of proceedings by turnpike trustees evidence.

We have seen, in a former page (*c*), that orders and proceedings by turnpike trustees must be entered in a book kept for the purpose, and that the book must be open at all seasonable times to the inspection of any trustee. It is further provided, that all books of this kind, as well as the books in which the oath or affirmation directed to be taken by such trustees shall be entered, and also the books directed to be kept for registering mortgages and assignments, and all entries in such books respectively, shall and may be read in evidence in all courts whatsoever, in all cases of appeal, and in all prosecutions, suits, and actions whatsoever (*d*). And by a very recent turnpike act, it was declared, that all books kept for registering mortgages or assignments, and all entries therein, and all books containing the accounts and proceedings of the trustees, in the execution of

(*a*) 3 G. 4. c. 126. s. 134.
(*b*) Id. s. 138.
(*c*) Ante, p. 137.
(*d*) 3 G. 4. c. 126. s. 72.

any local turnpike act, kept according to the directions and provisions of such act, or of the 3 G. 4., or by this act [9 G. 4.] and made evidence thereby, shall be admitted in evidence in all cases of appeal, and by all judges, justices, and others, without proving the facts therein contained, unless such facts be first controverted, notwithstanding any former act, under the provisions of which such books may have been originally kept, may be repealed; and all such books shall be preserved, and kept by the clerk for the time being to such trustees, and shall at all seasonable times be open to the inspection of the trustees, or any creditor, without fee or reward; and the trustees or creditors may take copies or extracts from the books, or from any part, without payment. If the clerk refuse to permit, or do not permit the trustees or creditors, or any of them, to inspect the books or take the copies, &c. he shall forfeit a sum not exceeding 5*l.* for every such offence (*a*).

Evidence against parish upon indictments for the non-repair of their ways.

The first case to which our attention is directed, is the evidence necessary to sustain the ordinary indictment against a parish for not repairing a highway within it.

A public road.

First, it must be shewn that the place indicted is a common highway (*b*), which is done by calling witnesses to prove that the way has always been considered public by common reputation (*c*), or that it leads from one market town to another (*d*), or that there has been a dedication of the way to general use by the original owner of the soil*; and that the parish has acquiesced in the dedication, for, as we have seen before, a parish must acquiesce under such circumstances before they can be burthened with the obligation to repair (*e*). It is not necessary to set out the *termini*; but if they should, inadvertently, or for any particular purpose, be mentioned, proof of the accuracy of the statement of such *termini* must be adduced, or the defendants will be acquitted (*f*).

Within the parish.

Further, it is necessary to shew that the road, or that part of it which is indicted, lies within the parish (*g*), and, of course, that it is within the county which gives the venue. Should

(*a*) 9 G. 4. c. 77. s. 2.

(*b*) 1 Str. 181. See Stark. on Ev. Pt. IV. p. 662, &c. That evidence of a public footway will support a claim of a public highway, see 8 East, 4, Allen v. Ormond.

(*c*) By Lord Kenyon, 1 East, 357.

(*d*) 1 Ventr. 189.

* The subject of dedication has already been discussed at large in the second chapter, to which the reader is referred.

(*e*) 4 B. & A. 447, Rex v. St. Benedict Inhabitants.

(*f*) See 6 Esp. 136, Rex v. Great Canfield.

(*g*) 1 Str. 181. Archbold's Crim. Pleading, 3rd ed. p. 65.

there be any local description of the road which, upon the trial, turns out to be inaccurate or uncertain, provided that it be described as a direct road, advantage can only be taken of the error by plea in abatement, and not under the general issue (*a*).

Out of repair.

The prosecutor then goes on to shew, that the way is out of repair; and the liability of the parish in ordinary cases to amend it being presumed, and therefore not required in proof, the case in support of the indictment is so far sustained as to require an answer from the parish.

Other evidence.

Other evidence in support of the obligation to repair may, however, unquestionably be given; and it need hardly be said, that upon almost every indictment the proof varies according to the circumstances of the case.

Prior convictions are not unfrequently resorted to, for the purpose of fixing a parish, inasmuch as they are conclusive evidence against the parish. Thus, where a parish consisting of three townships was indicted for not repairing a highway, the township of *B.* pleaded, that each township had, from time immemorial, separately repaired the highways within its bounds, and that the highway in question was in the township of *E.* The custom so alleged was traversed by the crown. Several indictments against the parish were produced on the part of the prosecution, to which it appeared that a plea of not guilty had been put in, and on which the parish had been convicted. And by Le Blanc, J., "The records *primâ facie* disprove the custom alleged." The defendants offered to shew, that the inhabitants of *B.* were not aware that pleas of not guilty had been pleaded, and the judge said, that he would admit evidence to the effect that they were pleaded only by the inhabitants of the other townships; for he said, that the rights of the township of *B.* could not be affected by what the others exclusively did. The custom, however, was negatived on other grounds, and the defendants were convicted (*b*). Again, upon an indictment against the inhabitants of St. Pancras, after the case for the prosecution had closed, the defendants produced a copy of a record of conviction upon an indictment against the inhabitants of the parish of Islington for not repairing the road in question; and Lord Kenyon held, that this record was *conclusive* evidence against the parish of Islington (*c*). "I admit," said the learned Chief Justice, "that had there been an acquittal, the record could not have been evidence for the parish of Islington. The reason why it

(*a*) 1 Stark. 357, Rex v. Hammersmith Inhabitants.
(*b*) 2 Campb. 494, Rex v. Eardisland.
(*c*) Peake, N. P. Cases, 220, Rex v. St. Pancras Inhabitants.

would not have been evidence for them, is because some other parties might have indicted them, and those parties could not be bound by this record." "Unexplained," added Lord Kenyon, "this is conclusive evidence."

Such are the principal heads of evidence applicable to a public highway. But there are occasions upon which some of these cannot be made available in support of the right. Thus, evi- Reputation.
dence of reputation cannot be received in general *post litem motam*. "Reputation", said Lord Ellenborough, respecting the case of a prescription, "is in general weak evidence; and when it is admitted, it is the duty of the judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have." (*a*) The defendant was indicted for not repairing a highway in Staffordshire, which it was alleged he was bound to repair *ratione tenuræ*, and on the part of the prosecution a bond executed sixty years since was offered as conclusive evidence of the obligation to repair. It was conditioned to abide the award of *J. B.* deceased; and the award determined that the tenant and occupier of *N.* farm, and not the township, was bound to keep the road in repair. The defendant was tenant and occupier of *N.* farm. The judge * said, that as a tenant could not bind his landlord, the bond could not be received in evidence at all, and that the other document could not be received as an award, whatever effect it might have as evidence of *reputation*. It was then objected for the defendant that, being *post litem motam*, the award was not admissible even as evidence of reputation.

Dampier, J., "The award must either be received as an adjudication, or as evidence of reputation. I have already said I cannot receive it as an adjudication, for it could only be binding on an individual who was a party to the admission, and could not affect Lord Shrewsbury, who was seised in fee of the premises, or any person subsequently holding under him. I am likewise of opinion, that it is not admissible as evidence of reputation. The reason why the declarations of deceased persons upon public rights made *ante litem motam*, when there was no existing dispute respecting them, is, that these declarations are considered as disinterested, dispassionate, and made without any intention to serve a cause, or to mislead posterity. But the case is entirely altered *post litem motam*, when a controversy has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest, prejudice, or passion, that no reliance can safely be placed upon them; and they would more frequently impose upon the under-

(*a*) 1 M. & S. 687.
* Dampier, J.

standing, than conduce to the elucidation of truth. It has therefore been wisely decided, that evidence of reputation arising *post litem motam* shall not be admitted. Was there not *lis mota* at the time this award was executed by Mr. *G.*? The very submission to him shews, that the question was then agitated between the township of *A.* and the occupier of *N.* farm, which of them was bound to repair this highway. What deceased witnesses then stated to the arbitrator would not be receivable; and his opinion formed upon that, and expressed in his award, cannot be entitled to more credit." (*a*)

Award.

An award, indeed, must be acquiesced in by the parish sought to be charged, before it can be operative, and so it was holden, where such a document, executed by virtue of an enclosure act, was offered in evidence by a parish indicted, to shew that the road in question was not locally situate within the parish. The learned judge refused to receive this last-mentioned award, unless it could be shewn, that the notices required by the act had been given. For the commissioners had been authorized to ascertain the parochial locality of roads belonging to the adjacent and contiguous parishes, after having given previous notices to the parishes to be affected by the award. A verdict was found for the crown.

Upon a review of this case before the Court of King's Bench, the learned judge reported, that he should have admitted the award had the usage been pursuant to it, presuming that the proper notices had been given; but that, in this case, the award seemed to be wholly unknown until the prosecution. And the court discharged the rule for a new trial. For although it is intended, according to the general rule upon the subject, that a person required to do an act, for the omission of which he would be criminally answerable, has duly performed it, until the contrary appears; yet, in the case before the court, there was negative evidence, to wit, that the parish indicted had continued to repair, and thereby the presumption, that all had been duly performed, failed, for if that were so, they ought not to have continued to repair (*b*).

Defence by parish.

Under not guilty, the parish cannot give any thing in evidence, except that the highway is in repair (*c*). That is, of course, admitting that the road is a public passage, that it is situate within the parish, and that the particular part which is ruinous is so situate (*d*). In fact, upon not guilty, the defend-

(*a*) 3 Campb. 444, Rex v. Cotton.

(*b*) 2 M. & S. 558, Rex v. Haslingfield Inhabitants.

(*c*) Comb. 396, Rex v. Ireton Inhabitants. 1 Ventr. 256, Anon. 1 Mod. 112. Carth. 212. So also it was where a man was indicted for not working at the highways upon notice. Comb. 312, Rex v. Terrel.

(*d*) See Stark. on Ev. Pt. IV. p. 671. Archbold Crim. Pl. p. 418.

ant may controvert every thing, which the prosecutor is bound to prove (*a*). Now, as the prosecutor must shew, upon this indictment, that the place is a highway—is within the parish—and is out of repair, it follows, that the parish may disprove all these things by opposite testimony.

The same rule prevails upon a presentment as upon an indictment (*b*). There is, however, an exception to the rule where the obligation to repair is transferred from the parish to other persons, by an act of parliament, because all are supposed to be privy to an act of that kind, and to have cognizance of it (*c*).

Upon a special plea that some other persons are liable, the parish must be prepared to prove that allegation (*d*), as, that *A. B.* is bound to repair *ratione tenuræ*, &c.

The record of an acquittal, upon an indictment against the parish, regarding the same piece of highway, is not evidence in their favour, upon a special plea, because some other party might indict them, who would not be bound by the record. Nor is the record of a former conviction evidence against them, if *they plead specially* that others ought to repair. Although, upon their pleading the same plea to a subsequent indictment, the record of a judgment after a verdict against them, would, probably, be conclusive evidence against them (*e*).

Evidence upon indictment against a lesser district than a parish.

A very different rule prevails where the indictment is against a particular district, as a township, &c. In this case, the common law obligation does not exist, and, consequently, upon the plea of not guilty, the prosecutor must enter upon the particular obligation which lies upon the defendants to repair the road in question. Therefore, an immemorial custom to repair must be proved, in addition to the facts of the way being public and of its being out of repair. But no *consideration* for this liability need be shewn, as in the case of charging another parish with the repair (*f*).

The subject, independently of the question of evidence, has been discussed at large in the sixth chapter, which treats generally of the repair of ways. Nevertheless, it should be observed here, that if the prescription stated in an indictment against a township, be that the inhabitants have been immemorially used to repair all roads situate within it, which, but for such usage, would be re-

(*a*) 1 Str. 183, per Eyre, J.
(*b*) 2 Wms. Saund. 158, n. 3.
(*c*) By Lord Ellenborough, 3 Campb. 223.
(*d*) Stark. on Ev. Pt. IV. p. 671.
(*e*) See Archbold's Crim. Pl. p. 420.
(*f*) Stark. on Ev. Pt. IV. p. 669. And see ante, Ch. VI.

pairable by the parish at large, the township is placed in the situation of a parish, and must shew, by special pleading, as a parish ought, that some other persons in certain are bound to repair (*a*). But subject to this general liability, the rule applies, that if a township be charged, *against* common right, with the repair of a highway by prescription, they may discharge themselves upon not guilty, because, as upon this issue, the prosecutor is bound to prove that the defendants are chargeable by prescription, the defendants may disprove the allegation by opposite evidence (*b*). Although, again, if the township plead, however unnecessarily, the special matter that they ought not to repair, they must not stop there, but, both in their plea, and also when they come to trial, must go farther, and shew who ought (*c*). Therefore, it appears, that in general, a township may shew, under the general issue, their non-liability to repair, unless they should be liable to put *all the roads* in their district into condition; and yet, if they will venture uselessly upon a special plea, they must be prepared to prove it.

Evidence upon an indictment against a particular individual.

The evidence in support of an indictment against an individual *ratione tenuræ,* must go the length of shewing that he is the occupier of the lands in respect of which his liability is said to arise, as charged in the indictment, that the lands were originally granted to be holden by the service of repairing the particular portion of the highway which is the subject of the indictment, or, that those who have preceded the defendant in the occupation of the lands, have always been accustomed to repair this way, from which circumstance a grant will be presumed (*d*). We have already seen that the occupier, and not the owner, is the party to whom the law will look for the fulfilment of this obligation. Thus, upon an indictment against the defendant, for not repairing a house, standing upon the highway, which was ruinous and likely to fall down, and which it was charged the defendant occupied, and ought to repair, by reason of his tenure, the jury found that he was only a tenant at will, and upon the question, whether he were liable, the court said, that he was answerable, as occupier, to the public, and that as the danger was the matter which concerned the public, the public must look to the occupier, and not to the estate (*e*). So, where the defendants, who were firemen, threw down chimneys which, after the happening of a fire, seemed about to fall, and threatened immediate danger to foot-passengers upon a crowded highway, it was held, that evidence to that

(*a*) 4 B. & A. 75, Rex v. Hatfield Inhabitants.
(*b*) 2 Wms. Saund. 159 (b), n. 10.
(*c*) Ibid.
(*d*) Archbold Crim. Pl. p. 420. See also ante, Ch. VI., and Stark. on Ev. Pt. IV. p. 669.
(*e*) 1 Salk. 357, Regina v. Watts.

effect would be a sufficient answer to an action of trespass. The defendants had a verdict (*a*).

Alderman Skinner was indicted for not repairing seventy-five feet of a ditch, bounding a certain part of the highway leading from Mitcham to Ewell: the first count charged him by reason of the tenure of certain lands abutting on the ditch, which was the boundary of the highway; and the second, by reason of the occupation of the lands. It appeared, that a former tenant of the premises had done repair for twenty-five years, at different times; but it was contended, for the defendant, that there had been an encroachment belonging to that tenant, that the party making the encroachment was certainly liable to keep it in repair, but that, upon the removal of it, which, in the present instance, had been done, if the person in possession of the adjoining premises reinstated the ditch once, leaving it in perfect repair, it would then be sufficient. This defence, however, was considered unavailable, by reason of the constant repairs done by the tenant above alluded to, and the defendant was found guilty (*b*). Mr. Justice Heath, who tried the case, said, that usage in questions of that sort was always to be attended to; that if the tenant had contented himself with repairing the road once, and had then left it to the trustees of the road, or to the parishioners, to have afterwards repaired it, it would have had the appearance of an encroachment; but that the tenant, by repairing the way, had shewn his sense of his own liability (*c*).

We have seen (*d*), that if the land be divided amongst several occupiers, each is liable for the repair of the whole of the road in respect of which the repairs are required to be done, and that a remedy for contribution lies over in favour of the person repairing. In addition to the above evidence, it must be proved also, that the highway is in a state which requires amendment.

Defences against the indictment *ratione tenuræ.*

Upon the defence of a person charged, as above, by reason of his tenure, the rule again applies, that as his obligation is against common right, he may discharge himself under the general issue, and may, accordingly, throw the burthen of repair upon the parish, or even upon an individual, under the plea of not guilty (*e*). The defendant need not fix upon any others in certain who may be bound to the repairs called for, as in the case of a parish, or a district placed in the same situation as a parish, he need only shew that the charge ought to be laid upon some persons other than himself (*f*).

(*a*) Moo. & Malk. 56, Dewey v. White.
(*b*) 5 Esp. 219, Rex v. Skinner.
(*c*) Id. 221.
(*d*) Ante, Ch. VI.
(*e*) 2 Wms. Saund. 159 (a), n. 10.
(*f*) Comb. 396, Rex v. Ireton Inhabitants. See 4 B. & A. 75.

By reason of inclosure.

Upon an indictment against a person *ratione clausuræ*, it is incumbent upon the prosecutor to shew an enclosure upon one or both sides of the highway (*a*), and also that the highway is out of repair. And as this liability to repair lasts no longer than the encroachment continues, it is a sufficient defence to shew that the way has been thrown open by a removal of the enclosure, and that the road has been restored to its former condition, for then the party is discharged from repairing the highway for the future (*b*). Although, if one be bound to repair by reason of his tenure, the act of his levelling an inclosure, and thus throwing open the public road, will not alter his obligation, for he will always be responsible as before (*c*).

Evidence upon indictments for obstructions of highways.

Upon an indictment against a defendant for obstructing a highway, after shewing the fact that the place in question is a public way, proof must be given of the particular obstruction as charged in the indictment, whether it be by setting up a gate, placing rubbish on the way, or any other offence of a like nature (*d*). In answer to this, the defendant may shew that the obstruction has arisen from accident, and not from negligence or intention (*e*). Or he may prove that the alleged obstruction has arisen from the exercise of a lawful right on his part, as the holding of a fair, market, &c. Thus, where it appeared, by the statement of the prosecutor's counsel, in opening an indictment for obstruction, that the place in question had been used as a market, for the sale of clothes, &c., for about twenty-five years, but that the privilege so claimed had been considered as an encroachment, and had not been acquiesced in, Lord Ellenborough interposed, observing, that after twenty years' acquiescence, it appearing to all the world that a fair or market had been held there, he could not hold a man to be criminal who came there under the belief that such a fair or market was legally instituted. If the fair or market was not a legal one, the party might be proceeded against for usurping the franchise; but the enjoyment for twenty years was, in his opinion, an answer to the criminal part of the charge, if the market had been used without interruption. An acquittal was directed (*f*).

Evidence upon indict-

We come next to consider the evidence applicable to indict-

(*a*) Stark. on Ev. Pt. IV. p. 670.

(*b*) Per Kelyng, C. J. 2 Saund. 160. Stark. on Ev. *ut suprà*.

(*c*) Id. 161.

(*d*) See Archbold Crim. Pl. p. 414. See also ante, Ch. IV. as to what shall be said to be an obstruction.

(*e*) Stark. on Ev. Pt. IV. p. 672.

(*f*) 4 Esp. 109, Rex v. Smith. It was said in an old case that it was not sufficient to shew that a person indicted for obstructing the highway with posts and rails, continued the obstruction, or would not suffer it to be removed, but that evidence of her having set them up must be adduced. 1 Ventr. 183, Austin's case.

ments for not repairing bridges. And, as in the case of a highway, it is necessary to shew that it is public, that it is within the parish, and is the same with that mentioned in the indictment, and in a ruinous state; so, in the case of a bridge, testimony must be advanced to the effect that it is a public bridge, that it is situate within the county, and that it is out of repair (*a*). If the bridge have been used constantly by the public, and be of public convenience, evidence to that effect will sustain the charge. And thus it was, that where a person had erected a bridge, for his own benefit, forty-five years before an indictment was preferred against the county where it was situate, but the public made a continual use of it since the building, the county, and not the individual mentioned, were held liable to keep it up (*b*). From whence it follows, that proof need not be given, that the bridge is an ancient bridge. The bridge must also be shewn to be the same with that which is mentioned in the indictment, and of the same description. For where it was charged, that a bridge was a public carriage-bridge, and also for the king's subjects passing and repassing on foot, but it appeared in evidence, that it had been used by passengers on horseback and on foot, and not with carriages, it was held, that the defendants could not be convicted of any part of the charge (*c*). ments for the non-repair of bridges.

The prosecutor having shewn the public user, the local situation, and the ruinous state of the structure, it becomes obligatory upon the county to make a defence to the charge, or submit to a verdict. If a plea of not guilty be put in, the same rule prevails as in the case of highways, namely, that you can give nothing in evidence except that the bridge is in repair (*d*), admitting, of course, the situation of it, and that it is a public bridge. For these three points,—the locality, the state of repair, and the general user of the bridge, may be controverted on the general issue (*e*). Evidence may also be admitted, upon not guilty pleaded, that repairs have been done by private individuals; that is one medium of proof, although, if unsupported, it is of very little weight (*f*). But that evidence is applicable to the question, whether the bridge be public or private, for if it be once admitted, that the bridge is public, a special plea is necessary, in order to cast the burthen of repairing it upon others. "In order to ascertain whether it be a public bridge, the mode of its construction, and the manner of its continuance, may be circumstances which, as they are connected with others, may have much or little weight." (*g*) And Defences.

(*a*) See Stark. on Ev. Pt. IV. p. 312. As to what shall be said to be a public bridge, see ante, Ch. VIII.

(*b*) 2 M. & S. 513, Rex v. Kent Inhabitants.

(*c*) By Bayley, J. Rex v. Lancashire Inhabitants. Stark. on Ev. Pt. IV. p. 316.

(*d*) 1 Str. 181. 183.

(*e*) Stark. on Ev. Pt. IV. p. 315.

(*f*) By Le Blanc, J. 2 M. & S. 265.

(*g*) By Lord Ellenborough. Id. 264.

thus, where, under a plea of not guilty, it was proposed to prove, on the part of the defendants, (the county,) that the feoffees of certain estates had repaired a bridge, and that one *R.*, as their agent had the control of the key *, the learned judge rejected the evidence, on the ground that repairs done by individuals could not be evidence to shew the bridge not a public bridge, but the court made the rule absolute for a new trial. For they said, that in the extreme rigor of correctness, the proof should have been received, that upon the *summum jus*, although not of much weight, it still was barely admissible, and that the defendants had a right to give every species of evidence to shew that the bridge in question was not a public bridge (*a*).

Special pleas.

Where the county have a special reason for being discharged, they must plead specially. Care must be taken that the plea be adapted to the same kind of bridge mentioned in the indictment, as will be seen by the following case.

An indictment charged the West Riding of Yorkshire with the non-repair of a public carriage bridge. To this it was pleaded, that certain townships had immemorially repaired the *said* bridge, and upon this plea issue was joined. It turned out, however, that this bridge had been a foot bridge until the year 1745, when it was enlarged to a horse-bridge by the townships, and to a carriage-bridge in 1755 at their expense; that the riding had never repaired it, and that there was another bridge which served for the same road. It was insisted for the prosecution, that the evidence did not maintain the issue; which was, that the townships had immemorially repaired a *carriage* bridge, for the carriage bridge had evidently been erected within time of memory. The judge was of the same opinion, but a verdict was found for the defendants. However, a new trial was granted upon application to the Court of King's Bench, on the ground, that the plea had admitted this bridge to be a public carriage bridge, and consequently that the county were bound to repair it (*b*). Upon the general principle, Buller, J. said, "where a party is bound to repair a foot-bridge, he shall not discharge himself by turning it into a horse or carriage-bridge, but still he shall only be bound to repair it as a foot-bridge; that is, *pro ratâ*: but otherwise the county are bound to repair all bridges of public utility." (*c*) In a plea, therefore, by a county that a smaller district is liable, the immemorial custom for the inhabitants of that district to repair must be shewn, as upon indictments for the non-repair of highways (*d*).

* It was a public bridge, but used only in times of flood, so that the public had a limited right.

(*a*) 2 M. & S. 262, Rex v. Northamptonshire Inhabitants.
(*b*) 2 East, 353, n. Rex v. West Riding of Yorkshire.
(*c*) Id. 354, n.
(*d*) See Stark. on Ev. Pt. IV. p. 316.

So again, where a wooden bridge had been turned into a wider bridge of brick, the allegation of an immemorial repair by the parish of the *said* bridge, was considered to be at variance with the proof, and there was a verdict against the county upon that plea (*a*).

Ratione tenuræ.

The alienation of part of land liable to repair a bridge will not have the effect of relieving the purchaser from the obligation, because the liability cannot be severed. And, therefore, where part of the demesnes of a manor were alienated, it was holden, that an indictment or an information would lie against any or all of the alienees; and therefore the defendant was convicted (*b*). The judgment, however, was subsequently arrested for want of an allegation of some prescriptive liability to repair, or that the liability arose by reason of tenure (*c*). It was said upon the same occasion, that where a man is obliged to repair a bridge, his tenant for years being in possession will be obliged to do it; and if he fail, he will be indictable for it (*d*).

In an indictment against a county, they pleaded that Mr. *M.* was liable *ratione tenuræ*. It appeared that the bridge had always been repaired by the Cadogan family, that Mr. *M.* purchased the whole of an estate belonging to that family and liable to the repair, except 100 acres; and that since the conveyance, Lord Cadogan had continued to repair the bridge. It was holden upon this, that as Lord *C.* still retained an ownership over part of the property, and had repaired since the alienation to Mr. *M.*, the inference would be, that he was still liable in respect of the portion remaining to him; and a verdict was accordingly given against the county. A new trial was moved for; but the judges said, that the defendants had not maintained their plea (*e*). There was no proof that Mr. *M.* and all those, &c., had immemorially repaired, since it appeared that another person had repaired. It would have been more correct to have pleaded, that he, and those whose estate he has with others, have repaired, instead of which the burthen is cast on him [Mr. *M.*] impartibly, without giving him the benefit of a contribution from Lord *C.*(*f*) Judgment, nevertheless, was ordered to be staid upon payment of the costs of the prosecution; and Lord Ellenborough said, that if the public exigency required it, the county must repair without prejudice to their case, and, by Le Blanc, J.; might proceed to indict the parties whom they contended to be liable (*g*).

(*a*) 2 Campb. 455, Rex v. Surrey Inhabitants.
(*b*) 2 Lord Raym. 792, Regina v. Bucknall.
(*c*) Id. 804, S. C.
(*d*) Ibid.
(*e*) 16 East, 223, Rex v. Oxfordshire Inhabitants.
(*f*) Id. 224, by Lord Ellenborough.
(*g*) Id. 225.

Corporation.

The corporation of Stratford-upon-Avon were indicted for the non-repair of an ancient stone bridge over the river Avon, and an immemorial custom to repair it was alleged. Another count, calling them a corporation by prescription, alleged an immemorial usage to the same effect. There were two other counts, and the plea was not guilty. It was proved at the trial, that the corporation had always repaired at their own expense; and it was admitted that the bridge stood partly in the borough, and partly in the parish of Stratford. It was objected for the defendants, that as it appeared by the charter, that the inhabitants were first incorporated in the reign of Ed. VI., the prescriptive liability, as alleged in all the counts, was disproved; secondly, that the obligation to repair arose from a gift of lands, &c. made by the charter to the corporation, in *trust* to support and repair the bridge; a breach of which obligation, however it might be remediable in equity, was not the subject of an indictment; and thirdly, it was said, that the corporation, if at all answerable, were so *ratione tenuræ*. All these difficulties were refuted by the learned judge *: as to the first, he considered that it might be inferred from the charter, that there had been from time immemorial a corporation under some denomination or other at Stratford, by whom the bridge had been repaired. He disposed of the second and third objections by saying, that the lands might be a fund auxiliary to the support of the bridge, but not the creation of the obligation. The case then came before the Court of King's Bench, who, after a long argument, discharged a rule for a new trial, being of opinion, that the evidence of this being a corporation by prescription preponderated, that there was nothing to shew that the corporation were chargeable *ratione tenuræ;* and that, notwithstanding words of creation of a new corporation, there were other expressions in the charter, from whence it might be presumed, that an ancient and immemorial corporation existed in the borough independent of the guild (*a*).

Authority of clerk of commissioners.

Where a private act of parliament empowered commissioners to cause actions to be brought for the recovery of paving rates, and ordained that, under the act, they might sue or be sued in the name of their clerk, it was holden, that no evidence was necessary to shew that the clerk had the sanction of the commissioners to commence the action, for had he acted without their concurrence, the defendant might have staid the proceedings (*b*).

Evidence to support special pleas of public rights of way.

The evidence required to support pleas of rights of way comes next to be considered. With regard to a public right of this nature, much of the testimony which should be adduced to prove

* Mr. Baron Wood.

(*a*) 14 East, 348, Rex v. Stratford-upon-Avon Mayor, Aldermen, and Burgesses.

(*b*) 2 C. & P. 557, Truwhitt v. Deprce.

such an easement in cases of indictment is available to sustain a plea of this sort. That the place is a public highway, is the principal proof which the defendant must rely upon, for if the plaintiff charge him with a trespass upon a particular place, it is the best defence to be prepared with evidence to shew, that the *locus in quo* is public for all the king's subjects.

Evidence of a public *footway* is sufficient to uphold the claim of a public highway, and so it was holden in a case where the *terminus ad quem* was laid to be a public highway (*a*).

It should be observed, that this public right, being a less interest than the possession of the *locus in quo,* must be specially pleaded, although the practice on the circuits formerly was in favour of admitting such testimony upon the general issue (*b*). And thus, upon not guilty, where the defendant offered to give evidence of a highway, Holt, C. J., said, that it was a special justification, and ought not to be allowed on the general issue (*c*).

And the matter was again considered, some years afterwards, upon a case from Devonshire, where the question was fully debated by the judges, and a great majority of them were of opinion, that the highway must be shewn by special pleading. It was said upon the motion for a new trial, the judge having refused to receive the evidence, that the admitting of such evidence must be a great surprise upon the plaintiff, who, having enjoyed the land as his freehold, has no reason to suppose it is a highway, or that the defendant will insist upon it as such (*d*). A matter of right, it was said upon another occasion, cannot be given in evidence, not even in mitigation of damages (*e*).

To rebut this plea of a public right of way, the plaintiff should adduce proof of acts of ownership over the close where the trespass is alleged to have been committed, such as, that a bar has been always put up to denote, at least, a qualified right of passage, that gates have been always placed against the way, and kept locked to prevent the intrusion of strangers, that, as owner of the fee, he had demised to a tenant, who permitted the way to remain open without his the plaintiff's knowledge, with many other media of proof, to negative the claim of public enjoyment. A verdict against a former defendant claiming the

(*a*) 8 East, 4, Allen v. Ormond.
(*b*) 1 Salk. 287, pl. 24, in the note, Duchess of Marlborough v. Grey, cited there. 12 Vin. Ab. 80, pl. 96, at Sarum, per Price, B.
(*c*) 1 Salk. 287, Watson v. Sparks.
(*d*) 12 Vin. Ab. 78, pl. 91, note, Selman v. Courtney. S. C. 7 Mod. 301. See Skin. 321, Anon.
(*e*) 6 Mod. 153.

same right, is good to defeat a similar pretension upon another occasion, and when produced in evidence, is conclusive upon that subject. Thus, to negative the existence of a public footway, the plaintiff's counsel tendered in evidence the record in another action brought by the same plaintiff in trespass, to which there was a similar plea of justification for a common footway over the *locus in quo*, and another justification for a prescriptive easement to go upon the land to wash and shear sheep at shearing time, in right of a certain messuage, &c. These justifications were traversed, and the issues found for the plaintiff, thus negativing the right of way, and the other easement. This latter easement was not pleaded to the action in which the above record was tendered. The counsel for the defendant objected to the admissibility of the record, as being *res inter alios acta*, and this objection being overruled, proposed to shew that no evidence had been entered into during the former action in support of the right of footway, but only as to the easement of washing sheep, and that the finding upon the first justification against the defendant was indorsed by mistake on the *postea*. This latter proof was rejected by the learned judge, and his decision was holden by the court to have been correct; for the defendants in both actions stood in the same relative situation, and the evidence tendered by the defendant went to impeach the authenticity of the record as to the fact of such a finding, and therefore was not admissible (*a*).

Evidence in actions for disturbing rights of way.

The evidence concerning private rights of way may be considered, first as it respects declarations for disturbance of those rights. In this case, proof that the plaintiff is possessed of some premises to which the easement appertains should be given, and of course his enjoyment of the easement must be shewn. This may be effectually done by calling witnesses to state, as upon a proof of commonable rights, that there has been an uninterrupted user for twenty years, from whence a legal presumption of a right to the thing claimed will arise (*b*). If a title be inadvertently set forth in the declaration, it must be proved, but as the title is not traversable, the pleading will not be vitiated on that account (*c*).

Proof, however, must be given that the right is appurtenant to the land, as stated in the declaration, for it will be quite insufficient to shew an appendancy to other lands (*d*).

Next, it is incumbent on the plaintiff to shew that he has been interrupted in the enjoyment of his easement, and this can

(*a*) 1 East, 355, Reed v. Jackson.
(*b*) See Stark. on Ev. Pt. IV. p. 387.
(*c*) Ibid.
(*d*) Ibid. See 4 Mod. 421.

be done by disclosing the nature of the disturbance. And lastly, it is usual to prove some damage, although to the smallest amount (*a*), merely to satisfy the jury that the plaintiff has been unable, in consequence of the defendant's conduct, to use his right in so ample and beneficial a manner as he has been accustomed.

Upon not guilty pleaded to an action upon the case for a nuisance in digging a hole in the way, whereby the plaintiff fell into the hole and hurt himself, the plaintiff shewed that one *J. S.*, his servant, was driving his horse in the way, and because the defendant had made the hole, the plaintiff's horse had fallen in and was spoiled, and so rendered unfit for service. Held no evidence to maintain the issue, for the way, and the hole dug, and all the matter conducting to the issue should have been found (*b*). In answer to this declaration, the defendant usually pleads not guilty.

In an action on the case, the plaintiff set out a title in his declaration, and said, that he and all those, &c., had a common in seven acres, and had one way leading through the seven acres, and from thence, &c., setting out the *termini*. The defendant pleaded not guilty, but did not traverse the prescription, and it was held that it was sufficient for the plaintiff to prove a title to the way by and through the seven acres, because the plea of not guilty was a mere denial of the trespass and disturbance, although, had the prescription been traversed, all the way must have been proved (*c*).

Evidence in actions on the case for the disturbance of ferries.

In an action on the case for disturbing a ferry, it is sufficient for the plaintiff to prove that he was in possession of the ferry when the cause of action arose. He need not prove the payment of any specified sum for passage money (*d*). And an user for thirty-five years is evidence whence the jury may presume that the ferry has had a legal origin (*e*).

In gross.

If a way in gross be disturbed, the deed of grant should be brought into court, or if claimed by prescription, it should be established by the usual testimony of long usage.

Ejectment.

Ejectment cannot be maintained for a way in gross, because the sheriff cannot give possession of any thing to which the claim would apply. But if that remedy be used to recover land to which a way may be appendant, the easement or appurtenance

(*a*) 2 East, 154.
(*b*) Sty. 335. Verdict quashed, and a new *venire* awarded, by Roll, C. J.
(*c*) Hutt. 39, Clerk v. Wood.
(*d*) 6 B. & C. 703, Peter v. Kendal.
(*e*) 2 Y. & J. 285, Trotter v. Harris. A variation in the toll of a ferry will not affect the franchise, although the ferryman will be liable for extortion, S. C.

will follow the premises to which it is claimed, and, at all events, after verdict, the way will be intended to be appurtenant. And we have seen, that ejectment lies for the recovery of parcel of the highway by the owner of the soil, since the sheriff may give possession of the road, subject nevertheless to the easement (*a*).

It seems to be good evidence for one claiming the soil of a way, that he has been accustomed to cut down the trees, or cleanse the way (*b*).

Evidence to prove a right of way by prescription.

Where a person pleads a right of way by prescription, he must set out his title, and, consequently, must prove it as laid. Testimony must, therefore, be brought forward to substantiate the immemorial usage which the plea alleges.

For a freeholder.

Hearsay evidence as to private rights of way.

And here we must advert to a difficulty which has arisen as to the reception of hearsay evidence in support of a claim of this nature. This question, indeed, upon which differences of opinion have occasionally prevailed amongst learned judges, embraces the evidence of prescriptive rights generally, which are strictly private, there being no doubt of the propriety of admitting reputation as evidence of public rights. The weight of opinion seems indeed to preponderate against the introduction of such proof, but it is a point upon which much probably will be said before the question is finally set at rest. We are not, however, without some authority in favour of the evidence above alluded to. Thus, it is laid down in a book of great credit, that in questions of prescription it is allowable to give hearsay evidence in order to prove a general reputation; and that, where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed (*c*). There does not appear to be any decision to the contrary of this on the subject of rights of way, but there are several determinations and declarations concerning other prescriptive rights, some in favour of, some against the evidence (*d*). And it seems, that the practice of the Western and Northern Circuits has been to receive the evidence, while that of the Oxford has uniformly rejected it (*e*).

Lord Kenyon expressed himself very forcibly upon one occasion. "Evidence of reputation upon general rights is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the

(*a*) See ante, Ch. I.
(*b*) 2 Leon. 148.
(*c*) Bull. N. P. 295, Skinner v. Lord Bellamont, cited there.
(*d*) See Stark. on Ev. Pt. IV. p. 1208, and Phil. on Ev. Vol. I. p. 264. All the authorities are collected in these books on Evidence.
(*e*) 14 East, 329, 330.

same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers to know any thing of what concerns only these private titles?" (*a*) "In such cases," says Mr. Phillips, "common reputation appears to give no satisfactory information, and to be inapplicable to the point in issue." (*b*)

In a case, where hearsay evidence tending to abridge a right of common in respect of the season for enjoying it was held admissible by the Court of King's Bench, after observing that moduses, and boundaries of parishes might be proved by traditional testimony, as affecting a large number of occupiers within a district, and so partaking of the nature of public rights, Mr. Justice Dampier said, that there might be particular cases where it would be difficult to press the distinction, as in the instance of a mere private right of way over a particular field; perhaps it might not apply there, added the learned judge (*c*). However, under either view of the case, a foundation for the admission of such evidence must be laid, by first proving an exercise of the right, which lets in reputation (*d*), and in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right (*e*) *.

Messuage.

A claim of a right of way in respect of an estate for the defendant, and all those, &c. his and their tenants, farmers, and occupiers of that estate, was held to be sustained by evidence, that the defendant was seised of an ancient messuage in the parish, although the messuage was in the occupation of a tenant, and the defendant occupied a newly built house in the parish at the time of the alleged trespass. The plaintiff's replication had denied the right as claimed, and that was the issue at the trial (*f*).

(*a*) 13 East, 329.
(*b*) Phil. on Ev., Vol. I. p. 264.
(*c*) 1 M. & S. 691. See 12 Vin. Ab. 118, pl. 9.
(*d*) Id. 690, by Dampier, J.
(*e*) 14 East, 330, by Buller, J.

* Unless strongly corroborated, this kind of testimony is by no means to be confided in, even if it should, hereafter, be deemed proper to admit it generally. But the argument against the admission, that the common belief of the existence of a right amongst inhabitants and neighbours is of no avail, seems hardly entitled to so much weight as to exclude this kind of evidence by virtue of its own force. For as in the case of a highway, the evidence of reputation is fortified by the continued user, so also would the traditional testimony be strengthened by evidence of a long exercise of the right. On the one hand, there is necessarily a greater power of evidence because of the unceasing and general traffic which takes place on a highway; but on the other hand, the author cannot help suggesting, that the residents in every neighbourhood are so much interested in comparing and investigating the rights which appertain to each other, that, like members of the same society, they are equally well acquainted traditionally with every visible enjoyment of rights within their districts, and are especially cognizant of easements so openly used as are rights of way, which cannot be exercised privately and in a corner.

(*f*) 16 East, 343, Stott v. Stott.

Termini. The *termini* of the way claimed must be proved as laid. And thus it was said of old by Chief Justice Richardson that you must prove the way, from whence it is, whither it goes, and over what land (*a*).

Too much care cannot be adopted, in reconciling the proof with the claim disclosed in the pleadings. Thus in a case already mentioned, the right demanded was a way from such a place *to* the village of Allesley, and so from thence back again, &c. Between the place from whence the way was said to arise, however, and the village mentioned, there was a close lying in the direct line, which had been conveyed in fee to a stranger without any reservation of the right of way, and thus the easement, as prescribed for, stopped short at that intermediate close. The court said, that this might be a good prescription to go *towards* Allesley, but certainly not *to* the village, and the verdict was accordingly entered against the right of way (*b*). However, in another case, where an intervening close was in the possession of the party who claimed the privilege, the court said, he should nevertheless recover, for he had in that case a clear right to go from one end of the line of way to the other; whereas, in the first case, another person possessed the close adversely to the right of the claimant (*c*).

It is no ground for setting aside a prescription, that a larger right is proved than that pleaded. Thus, the defendant proved a prescription to use a way over the *locus in quo* for certain inhabitants of Water Eaton *and other towns* to go to Leighton and Woburn. But the prescription as pleaded was for the inhabitants of Water Eaton *only*. And by Probyn, J. "the proving more does not vitiate the prescription." Verdict for defendant (*d*).

Evidence of a way for all manner of carriages will not necessarily support the claim of such a right for all manner of cattle. But it is a question for the jury to say whether a right of way for cattle is to be presumed from the usage proved of a cart-way, &c. Such a right may be inferred by a jury, but it is only evidence, and they are to compare the reasons which they have for forming an opinion on either side. The usage affords evidence of the right commensurate only with the user*. As, for instance, there may be good proof of a right to drive pigs along a certain way, but the user of the way for pigs is no proof of a right of way for oxen (*e*). Mr. Justice Chambre differed from the rest

(*a*) Litt. Rep. 295.
(*b*) 1 East, 377, Wright v. Rattray.
(*c*) Id. 381, Jackson v. Shillito, cited there.
(*d*) Selw. N. P. 7th ed. p. 1344, Fountain v. Cook. See id. 428, 1 Brownl. 177. Carth. 219.
* Mr. Justice Chambre dissented from the position in the case quoted below.
(*e*) 1 Taunt. 279, Ballard v. Dyson.

of the court upon this occasion; he said, that as a right of way for carriages, and also for driving hogs had been made out in proof, a *primâ facie* case in favour of a right for all manner of cattle had been shewn, and that the burthen of proving a restriction of the general easement ought to lie upon the grantor. The learned judge added, that, for one case where the evidence of restriction would be lost in consequence of a decision to that effect, a thousand cases would happen where a restriction would be created which did not exist in the original grant (*a*).

Again, evidence of a right to carry corn and manure over the *locus in quo* was held not to give a general and unlimited right. The question arose in an action of trespass, and it appeared, that the land in dispute was a head-land between a close belonging to the plaintiff and some land of the defendant, that this latter had a quarry in his field, from which he was in the habit of carting lime daily over the *locus in quo*. The defendant urged, that from the right of using the road for agricultural purposes, a right to use it for all purposes might be inferred. "This", said Mr. Baron Wood, "is not the law." There being, however, some slight evidence of a general user, the learned judge left the matter to the jury, who found for the plaintiff, thereby deciding against the unlimited right (*b*). It follows, from a review of the foregoing cases, that evidence of user is necessary to sustain the prescriptive claim. In trespass, the defendant justified in respect of a right of way, and for the purpose of explaining an ambiguity in the award of commissioners under an inclosure act, he shewed, that the occupier of his tenement had enjoyed the road in question for nearly fifty years subsequent to the making of the award, and that one of the commissioners, who was a party to the award, had occupied the plaintiff's close soon after the award, and had left a space of ground along which the defendant passed, unploughed, for the purpose of being used as a road. This evidence having been received, and a verdict found for the defendant, a new trial was moved for on the ground that parol evidence of the act of the commissioner could not be received to contradict his award. But the court refused the rule, observing, that the language of the award being ambiguous, it was competent to go into evidence of the enjoyment, in order to see what was the meaning of those who worded it (*c*).

Evidence of right of way for copyholder.

As the plea of right of way by a copyholder usually sets out, that there has been an ancient and laudable custom from time immemorial for every customary tenant of the defendant's customary tenement to have the right claimed, evidence must be

(*a*) 1 Taunt. 287.
(*b*) Holt, N. P. Cases, 455, Jackson v. Stacey.
(*c*) 5 Taunt. 752, Wadley v. Bayliss.

given of the existence of the custom. The copyholder's title must then be shewn, together with his user of the privilege.

Evidence of custom.

So where a custom to have a towing-path along the banks of a river is asserted, the usual evidence in support of an old usage should be adduced, such as the testimony of aged witnesses, deeds of antiquity, &c.

Evidence of way for a tenant.

Where a tenant contends for a private right of way, his possessory right must be shewn, such as his lease for years, or demise from year to year; proof of his entry upon the land, and of the privilege, together with the exercise of it, must then be tendered.

Evidence to sustain a right of way by grant.

If it be intended to claim a way by grant, it is scarcely necessary to observe, that the deed which gives the title must be produced in evidence. This is, of course, the best and most authentic proof of the easement demanded by the pleading. If the deed be lost, and there have been an uninterrupted user of the way for a considerable period of time, still, by proving the user to the extent mentioned, the jury may be warranted in presuming a grant originally made, but which, as stated in the plea, may have been destroyed by time or accident. Thus, in a case, where a right of way by deed, which deed was said to have been lost by time or accident, was disputed in an action of trespass, it appeared, that all ways over certain commons, wastes and messuages, had been extinguished by virtue of an inclosure act; that commissioners were to set out new ways, both public and private, and that by their award, an occupation way was assigned to *John W.* by mistake for *Joseph W.* (the person under whom the defendant claimed). The road, consequently, could not be legally enjoyed by virtue of the award. But it also turned out, that the occupiers of the defendant's close had always used the occupation-way over the *locus in quo* for upwards of twenty years, and that they had not used the way set out under the award for the defendant's estate. Further, it was proved, that with the exception of a year or two (where there happened to be an union of the plaintiff's with the defendant's close,) there was an adverse user over the plaintiff's close. Fourteen years since a ditch was cut between the two closes, and at that time a piece was left uncut for the defendant's tenant to pass over into the plaintiff's moss-dale, and when the latter was ploughed, room enough was left for a road to communicate with the defendant's close, and when some turf was set in the way, it was twice removed by the defendant's servants. No leave was at any time asked by the defendant's people, according to the evidence, nor was any interruption manifested till about two years before the action. It was relied on for the defendant, that after this unmolested usage for more than twenty years, the jury would be jus-

tified in presuming a grant. The learned judge presented to them the distinction between the enjoyment of a way by leave or favour, and under a claim or assertion of right, and said, that if they thought the defendant had used the way by licence, they must find for the plaintiff; but that, on the contrary, if they considered that there had been an adverse user for upwards of twenty years, they should find for the defendant. There was a verdict for the defendant, which the Court of King's Bench refused to disturb, holding, that such a length of enjoyment was strong evidence of a right (*a*). In a case of a similar description, where, however, the result was different, the same doctrine was laid down and subsequently recognized: it was an action of trespass. The premises of the plaintiff and defendant adjoined to each other. There had been an unity of possession, but the premises were afterwards severed, though the right of way was not reserved. There was conflicting testimony as to the undisputed use of the way, but it clearly appeared, that the right had been constantly contested. Gaselee, J. told the jury, that, if upon the issue [which was a denial of the grant] they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that that deed had been lost, they would find a verdict for the defendant; if they thought there had been no way granted by deed, they would find for the plaintiff. The jury said, they could not find any deed, and found for the plaintiff. This direction of the learned judge was held to be correct by the Court of Common Pleas (*b*). And by Park, J. "Nothing but uninterrupted usage can raise a presumption of a grant; here the usage was always interrupted" (*c*).

Evidence that the defendant had a way over close *A.* for the occupation of his close *B.* would not, it seems, be sufficient to sustain a similar right over close *A.* for the enjoyment of a newly purchased close, *C.* (*d*). For the *termini* being required to be accurately stated in the pleading, must be as accurately proved. But where the evidence was, that the defendant had a barn, and had purchased a way over the plaintiff's land to that barn, and afterwards had bought other lands lying contiguous thereto on the one side, and to a haven on the other side, and had carried carriages that way to the barn, and through it over his newly purchased land to the haven, Lord Chief Baron Hale said, "If I purchase a general way to such a place, I may go from thence on my own ground which way I please, though I purchase the ground after the way purchased." (*e*)

(*a*) 3 East, 294, Campbell v. Wilson. See ante, p. 19.
(*b*) 3 Bing. 115, Livett v. Wilson. Ante, p. 19.
(*c*) Id. 118.
(*d*) See 1 Lutw. 111, Laughton v. Ward. Stark. on Ev. Pt. IV. p. 1678.
(*e*) 12 Vin. Ab. 258, Heynsworth v. Bird, Norfolk Summer Assizes, 1665.

Although this last case may seem, at first sight, to clash with the other quoted from Lutwyche, and, indeed, with the general law on the subject, which forbids a man to use a way otherwise than according to his grant, yet it cannot escape observation, that Lord Hale considered the above as a *general* way, which not being subject, therefore, to the occupation of any particular close, might be used freely, and for all purposes. We have seen, that, where a man has a special right of way granted to him, he need not resort to a general right, which may be contested, but may rest upon his original title (*a*).

In an action on the case for not completing a title, it became necessary for the plaintiff to prove a right of way. He produced deeds by which the right had been granted, and pointed out the clauses which gave it. It was objected, that the deeds should be made evidence by producing the subscribing witnesses, but Lord Kenyon held such proof to be unnecessary. The learned Chief Justice said, that where the question was respecting a title, he would never allow, that the party should be called upon to prove the execution of all the deeds, deducing a long title, more especially in a case where there had been a possession. The deeds were therefore admitted without proof of the execution (*b*).

Evidence to sustain a claim of a right of way from necessity.

The claim of a way by a non-existing grant is very nearly allied to the mode of establishing the right to such an easement of *necessity*. This latter owes its existence upon most occasions, if not entirely, to a grant, either express or presumed by implication of law. For the ancient idea, that a man, who found himself in possession of a close to which there was no access except over the land of his neighbour, might, therefore, go over the strange land in order to reach his own, as of right, is not now received with any indulgence.

The testimony applicable to a way of necessity must, of course, depend upon the peculiar circumstances of each claim. For example, if a party having several closes, sell all, except one, which lies in the middle of the rest, as the law, in this instance, reserves a way for him, he must shew the grounds upon which he claims the privilege. So, if one buy land, to which he cannot attain except by passing over the vendor's land, he must adduce the facts in evidence, for together with the purchase, he takes, by operation of law, an easement necessary to the enjoyment of his interest. So, if there be a right to take tithes, or wreck, or any other profit permitted by the law, it must be sustained in evidence by shewing a title to the property in respect of which the way ought to be had, and then the law will interfere to protect

(*a*) 8 East, 4, Allen v. Ormond.
(*b*) 1 Esp. 185, Thompson v. Miles.

the party in the due exercise of his right. This subject of ways of necessity has been already discussed at some length in the second and fifth chapters, to which the reader is referred for further information.

Evidence in answer to these claims of rights of way.

With regard to the evidence necessary to disprove these claims of rights of way, as it is very usual to deny their existence, so it becomes incumbent on those who resist the easement to maintain the negative which is tendered in issue. As soon, therefore, as the proof in support of the right has been gone through, the other side must bring forward witnesses or documents to shew, that there is no foundation for the privilege demanded. For example, it may be established, that the user of the way in dispute has arisen by virtue of a revocable license, and that the license has been revoked; that the person enjoying the way has acknowledged an user by sufferance only; that in a contest concerning the same right, a verdict has passed against the claimant, and, in this case, the record, or a copy of it, must be produced. So again, where the right has been traversed, it may be shewn, that the way has been stopped by an order of justices; upon such an occasion, it will be indispensable, that the order relied on should correspond with the form prescribed by the act of parliament (*a*). And thus, extinguishment of the way by any legal operation, as by unity of possession, will afford a sufficient answer.

In the event of a claim of a way from necessity, proof that there is another way will, in general, defeat the presumption which the law raises, and, according to a late decision (*b*), proof that the necessity, which occasioned the user of the way, has ceased, will be tantamount to an extinguishment.

There are, unquestionably, many other media of evidence capable of rebutting a claim of the land above alluded to, different proofs being required to meet exigencies, which vary somewhat almost in every case.

(*a*) 1 East, 64, Davison v. Gill.
(*b*) Holmes v. Goring, 2 Bing. 76.

CHAPTER XI.

Of the Trial, Judgment, Costs, &c.

Indictment against parish.

THE *venire*, upon an indictment against a parish, for the non-repair of a road, may be awarded to the sheriff of the same county where the way lies, though, clearly, the jury must not come from the parish indicted.

Against county, for non-repair of a bridge.

In the case of an indictment for not repairing a bridge, it has been said, that one of the county is a good witness, though not a good juror (*a*); and, indeed, this is one of the occasions upon which the *venire* should not be laid within the county where the offence complained of has occurred, as an impartial trial cannot be had in the county where the bridge lies. Thus, in a question between the citizens of Norwich and the county of Norfolk, as to the repair of certain bridges, the trial took place in Suffolk, and it was objected, for the defendants, that there had been a mistrial, because the defendants could give nothing in evidence but that the bridges were in repair. But three judges * held, that the trial had properly taken place in Suffolk, for the question would naturally arise, whether the bridges were in Norfolk or Norwich, and the result of that would be, that one or the other must repair, and they said that all the points were put in issue by the plea of not guilty. The other judge † thought, that parcel or not parcel could not be given in evidence upon not guilty; but there being three to one, judgment was given for the crown (*b*).

So, again, upon an information against the County of Wilts, for the non-repair of Laycock bridge, the court said, that the attorney-general might take a *venire facias* to any adjacent county, that it might be *de corpore* of the whole, or *de vicineto* of some particular place therein next adjoining, and that the *venire* should come from thence for the necessity of an indifferent trial (*c*). The *venire* was moved for to the county of Berks (*d*). The

(*a*) 6 Mod. 307.

* Pratt, C. J., Powys and Eyre, Js.

† Fortescue Aland, J.

(*b*) 1 Str. 177, 181, Rex v. Norwich Inhabitants. S. C. recognized by Lord Mansfield, 2 Burr. 859.

(*c*) 3 Salk. 381, the Queen v. Wilts Inhabitants. S. C. 6 Mod. 307.

(*d*) S. C. as above. 6 Mod. 191. S. C. Holt's cases, 339. S. P. 12 Mod. 503, Anon. See 1 Ventr. 61.

same course would be pursued if a whole county were interested in the result of an information for not repairing a highway (*a*).

Trial of right of way.

In an issue, however, to try a right of way, merely private, the *venire* is local (*b*).

New trials on indictments.

We proceed to the consideration of new trials. The general rule is, that where a defendant has been *acquitted* in a case of misdemeanour, no new trial can be granted. The course is different where the party has been convicted, for Lord Kenyon has declared, that there is no authority to shew, that the guilt or innocence of a person so circumstanced cannot be again inquired into (*c*). The rule of not disturbing a verdict of acquittal for a misdemeanour, has been held to extend to indictments for not repairing highways. A new trial was moved for, on the ground that the verdict was against evidence. But Lord Ellenborough told the counsel, that unless he could point out some distinction between the case of a nuisance and other criminal cases, the general rule was not to grant a new trial after verdict for the defendant upon the merits. To be sure, it is in the nature of a remedy for a civil right, but being in form a criminal proceeding, the defendant can be punished criminally (*d*). The point, however, had been previously decided in a case, where, after an acquittal of a parish for non-repair, a new trial was moved for on the ground of *misdirection*, or overruling evidence at the trial, by reason whereof the parish were acquitted. But the court observed, that it was a criminal case, and that new trials were never allowed where a defendant was acquitted (*e*).

It should be observed here, that the new trial just mentioned as having been moved for, was on the ground of *misdirection*. Mr. Justice Dampier, in Rex v. Mann, expressed a slight opinion, that a new trial would be granted if the judge were to misdirect the jury. "In penal actions," said that learned judge, "where the verdict is for the defendant, the court, I believe, do not grant a new trial, except for the misdirection of the judge." (*f*) However, independently of the authority cited above to the contrary, there is also a *dictum* of Lord Ellenborough. It was suggested by counsel, that in a criminal case, a new trial

(*a*) 12 Mod. 503, Anon.

(*b*) See Cro. El. 898, Lord Sands v. Pinder. Hob. 190, in Gogle's case. But those cases were before the jury were summoned from the *body* of the county according to the present practice.

(*c*) 6 Term Rep. 638.

(*d*) 4 M. & S. 337, Rex v. Mann. Lord Ellenborough referred to Rex v. Reynell, 6 East, 315. An indictment for the non-repair of a churchyard fence. S. P. 1 Stark. 517, n. at Appleby, cor. Wood, B. S. C. sembl. Rex. v. Burbon Inhabitants. 5 M. & S. 392, S. C. See post. 1 B. & A. 63, Rex v. Wandsworth Inhabitants. Id. 67, (a) Rex v. Chigwell Inhabitants.

(*e*) 1 Wils. 298, Rex v. Silverton parish.

(*f*) 4 M. & S. 338.

might be granted in case of misdirection. But by Lord Ellenborough: "I do not know any such distinction as that which has been suggested." (*a*) But again, on the other hand, Lord Chief Justice Abbott, upon refusing a motion for a new trial, where the defendant had been acquitted for perjury, observed, that "no new trial can be granted after a defendant has been acquitted, unless on the ground of a misdirection of the judge." (*b*)

There is, therefore, the decision in the case of the King against Silverton, together with the opinion of Lord Ellenborough against a new trial by reason of misdirection, and there are the opinions of Lord Tenterden and Mr. Justice Dampier in favour of such a reconsideration.

Nevertheless, there is one other circumstance which has pressed very much upon the court during applications of this nature, namely, an anxiety that the right should not be compromised or bound by a verdict which might be wrong. Where a motion for a new trial was refused after the acquittal of a parish, the court said, that the rule might possibly be relaxed in some cases where such rights would otherwise be compromised, but that in the case before them [non-repair of a highway] there was no such necessity, for a new indictment might be found (*c*). And by Lord Ellenborough: "Inasmuch as the right will not be bound on the plea of not guilty, we do not think it would be proper to break into the general rule on the suggestion that the prosecution was merely intended to determine a civil right" (*d*).

Such special circumstances, however, have occurred on other occasions, as that if a verdict had been entered for the defendant, the right would have been bound without a fair inquiry into the merits of the case; and the court resolved, consequently, upon an expedient to *stay the judgment* until the result of another prosecution could be ascertained, and thereby adhering to the rule of refusing a new trial. The county of Middlesex were indicted for not repairing Kingston Bridge. The defendants pleaded, that the bailiff and freemen of Kingston were bound by immemorial custom to take upon themselves that burthen. The corporation of Kingston were also indicted for the non-repair of the same bridge; and both cases standing for trial at the same time*, the indictment against the corporation, the first in order, was first proceeded with. Evidence was

(*a*) 1 Stark. 516.
(*b*) 1 Chit. Rep. 354.
(*c*) 1 Stark. 517, n. (a) at Appleby, cor. Wood, B. Semb. S. C. 5 M. & S. 392, Rex v. Burbon Inhabitants.
(*d*) 5 M. & S. 392.
* Sittings after Trinity Term, 53 G. 3.

given that the corporation were liable, but as the indictment charged an *immemorial* obligation upon the bailiffs and freemen, whereas the bailiffs turned out to be officers of comparatively modern creation, it became necessary to abandon that indictment, and the defendants were acquitted. The indictment against the county then followed, and as their plea had also alleged an immemorial liability on the part of the *bailiffs* and freemen, it was found impossible to support it, and the county were compelled to submit to a verdict of guilty. Had judgment been entered upon this verdict, it would, of itself, have been conclusive evidence against the county; and therefore the court made a rule absolute for *suspending* the entry of judgment until another indictment (which had been in the interim preferred and found) against the corporation could be tried. The corporation were found guilty upon the second indictment (*a*).

Again, the parish of Wandsworth were indicted for the non-repair of a highway. The defence was, that the road in question was private, and not public. The evidence in support of the prosecution shewed, that a brick arch had been turned over a slough at the expense of the parishioners; that another parishioner had compounded for eleven years successively for statute duty, by repairing a part of the road, and that the parishioners had constantly conveyed gravel from pits on Wandsworth Common over the way for the repair of other roads in the parish; and other proofs appeared in favour of a general user of this place as a highway. The defendants called no witnesses, but the jury found a verdict for them. Upon this an application was made to the court for a new trial, which was refused; but a rule for staying the entry of the judgment was allowed (*b*). Lord Ellenborough said, that inasmuch as there was strong evidence of the user of the place in question as a highway, it would be injustice to the parties to refuse the indulgence conceded; and his Lordship observed, that if repairs be done by a parishioner under an agreement with the parish, in consideration of his being excused the statute duty, that is virtually a repair by the parish (*c*). The court also took notice, that if the verdict were maintained, it would be irresistible evidence against the prosecutor upon a subsequent trial; but they imposed a term that the parishioners of Wandsworth (whose testimony could not be received according to the general rules of evidence) should be examined at the next trial (*d*). Where a county were found guilty upon an indictment for not amending a bridge, in consequence of their having been unable to bring forward their case under the form of the plea which they had put upon the record, the court directed a

(*a*) 1 B. & A. 64, note (d) Rex v. Middlesex Inhabitants.
(*b*) Id. 63, Rex v. Wandsworth Inhabitants. S. C. 2 Chit. 282.
(*c*) Id. 66.
(*d*) Ibid.

rule to be drawn up for staying the judgment, upon payment of the costs of the prosecution. Lord Ellenborough said, that if the public exigency required it, the county must repair without prejudice to their case; and Mr. Justice Le Blanc added, that the county might proceed to indict the parties whom they contended to be liable (*a*).

Again, the county of Southampton was indicted for not repairing a bridge. The plea was, that the Marquis of Buckingham ought to repair. After a verdict for the crown, it was moved to have a new trial, or to stay the judgment until the event of a trial with the Marquis; and the court permitted a suspension of the judgment, not generally, but only until they should make further order. Lord Ellenborough in this case observed upon the frequency of these applications since the indulgence granted in Rex v. Oxfordshire, and said, that the court did not like to increase the number of such applications. He subsequently yielded to the reason assigned by counsel, that the verdict would be binding on the county for ever; but said that all reasonable speed should be used to try the question, or otherwise that judgment would be entered up on the verdict (*b*).

New trial in civil actions.

Where the merits of a cause have been fully tried, the court will not grant a new trial. The defendant mistook the *terminus a quo,* as laid in his prescription, it appearing that his way claimed led from a *private* way instead of a common highway as he had alleged, but he obtained a verdict; and the merits having been fully gone into, the court refused a new trial (*c*).

Judgment.

It was excepted in an old case, where a parish had been convicted for not repairing a highway, that the judgment was preposterous, being that such a sum *extrahatur et levetur* to repair the said way, instead of *levetur et extrahatur,* and the judgment was reversed for this error. The court put the comparison between it and the case of debt on bond for 10*l.*, saying, that if judgment in that last case were, "*ideo consideratum est, quód habeat executionem de præd.* 10*s.*, *et recuperet,* it would be error." (*d*)

Fines.

The subject of fines has already been much discussed in the chapter which treats of repair (*e*). It should be observed, however, that the fine imposed upon a conviction by a criminal

(*a*) 16 East, 223, Rex v. Oxfordshire Inhabitants.

(*b*) 2 Chit. Rep. 215, Rex v. Southampton Inhabitants.

(*c*) 3 Wils. 272, Sampson v. Appleyard. And if the damages do not exceed 5*l.* the court will not grant a new trial, although the verdict be against evidence. It was so held upon a question of a right of way. 1 Taunt. 495, Roberts v. Karr.

(*d*) 12 Mod. 109, Rex v. Ragley Parish.

(*e*) Ch. VI.

information for the non-repair of a highway cannot be expended upon the repair of the way, whereas if the proceeding be by indictment, it should always be appropriated towards such repair. And therefore it is, that the courts are reluctant to give leave to file an information for the offence of non-repair, unless it be one of great enormity (*a*). Although, where the way was proved to be very foundrous, and the grand jury had refused to find a bill of indictment, the court permitted that measure to be taken (*b*) *.

Certificate of repair good evidence.

When the court are about to impose a fine, a certificate by justices of the peace, that a road is in good repair is a legal instrument, and admissible in evidence after conviction (*c*). The production of a false certificate of this kind for the purpose of influencing the judgment of the court is, therefore, an indictable offence (*d*) †.

Conviction.

Where a party was convicted of not doing statute duty, and a distress warrant was put in, upon which he brought an action of trespass, but was nonsuited, with leave to enter a verdict for nominal damages, if the court should be of opinion that the conviction was wrong, certain objections were tendered against

(*a*) Say, 93, Rex v. Steyning Inhabitants.

(*b*) W. Kel. 63, Rex v. Walbourne.

* The surveyor of a high road expended a considerable sum upon the purchase of land without the consent of the trustees, and in direct contravention of an act of parliament; it was held, nevertheless, that he was not liable to a criminal information, no corrupt motive having been alleged against him, for the court cannot convert a civil into a criminal remedy. 1 Chit. Rep. 702, Rex v. Friar. So again, such an information was refused when moved for against certain commissioners for pulling down a turnpike, the motion being grounded upon a suggestion of irregularity in the time and manner of their meeting. Loft. 199, Anon.

(*c*) 6 Mod. 163, the Queen v. Cluworth Inhabitants. See Sty. 163, Rex v. Mile End Inhabitants. 6 Term Rep. 631.

(*d*) 6 Term Rep. 619, Rex v. Mawbey and others. It was said in argument in the course of this case, that the statute of Winton was still in force as to highways ‡, that by 2 Ed. 3. c. 6, the above statute was made an article of the peace, the justices of peace being assigned commissioners with powers to inquire and punish, and that, as to highways, such justices were a court of record. 6 Term Rep. 630.

† The court will not quash an indictment for non-repair, unless it be certified that the way is in repair, as we have already seen in the sixth chapter. Thus, by Foster, C. J. First take issue on the nuisance, or have a certificate that it has been removed, else no exceptions to the indictment are allowable (*a*). The same law is enforced upon an indictment for the non-repair of a bridge (*b*). But upon an indictment against a person for not working with his team upon the highway, an objection was raised and allowed, without any certificate of repair, because the omission of working was considered not to be so important as the non-repair of the way itself (*c*).

‡ Cap. V., of that statute.

(*a*) 1 Keb. 256, Rex v. Randall. S. P. id. 291. S. P. Sty. 108.

(*b*) 2 Keb. 454, Rex v. Atwell.

(*c*) Id. 354, Rex v. Waterer.

the validity of the conviction. First, that the order which had been disobeyed was to perform the statute work, *or* compound for it, whereas the conviction was not performing the work, not mentioning the composition. Next, it was not said that the plaintiff kept a team, and, without a team, he could not be called upon to do statute work. And again, it was not alleged, that statute duty in kind was necessary. To the latter observation Lord Tenterden answered, that the necessity for statute-duty in kind must have been ascertained before the surveyor's requisition, and should, therefore, be presumed. And with regard to the other grounds of objection, the court considered, that they ought to have been urged at the trial. The rule was, consequently, refused (*a*). The liability of the plaintiff to do statute duty had also been denied, and upon that another objection to the conviction was raised. But by Lord Tenterden: "If in this late stage the question of liability could be raised, it might be equally raised after an appeal to the sessions against the appointment of one surveyor for the whole parish, although they might have decided that the appointment was proper, and one highway rate for the whole parish also proper. The impropriety of rendering magistrates liable to be sued for acting upon such a decision of the sessions is an additional reason for holding that the verdict in this case was proper." (*b*)

Order for imposing a rate.

An order for imposing a rate for repairing the highways was quashed for two faults; first, because it did not appear, but that the statute labour was sufficient; and, secondly, because only the *occupiers* of land were charged, whereas others were equally liable (*c*).

Costs.

As far as regards indictments or presentments for non-repair of ways, the reader is referred to the sixth Chapter, where the authorities upon the subject are mentioned.

In civil actions respecting rights of way.

Notwithstanding the apparent hardship upon a defendant, that if the plaintiff succeed in proving a trifling trespass *extra viam*, he shall have full costs, although the issue upon denial of a plea of right of way be found for the defendant, the defendant not even being allowed costs upon that issue, and notwithstanding that there have been conflicting decisions upon the subject, the Court of Common Pleas and Exchequer have concurred in adopt-

(*a*) 7 B. & C. 394, Fawcett v. Fowlis.
(*b*) Id. 396. 398.
(*c*) 1 Str. 315, Rex v. Stroud Inhabitants. A highway rate is a debt, and the assessor a creditor under the bankrupt laws, so that a denial to such a creditor is evidence of an act of bankruptcy. 2 B. & B. 390, Lloyd, Assignee of Warwick, v. Heathcote.

ing a rule long acted upon by the Court of King's Bench to the effect above stated. Consequently, if to an action of trespass, the defendant plead in justification a right of way, and the plaintiff then newly assign, and recover a verdict upon the new assignment, the defendant, so far from being entitled to the costs of the trial, is not even allowed the costs of the justification if found for him. So also it would be, if the issue on not guilty were found for the plaintiff, and the defendant's plea should not go to the whole of the declaration. In trespass the defendant justified for a way, the plaintiff admitted the way, and replied *extra viam:* it was holden, that he should have full costs (*a*). So where the pleas were not guilty, the issue upon which was found for the plaintiff, and next, a justification of a right of way generally, to which the plaintiff replied by traversing the right, and he also newly assigned, it was held, upon a verdict for the defendant upon the justification, and for the plaintiff upon the new assignment, that the latter should have full costs (*b*). If, however, there be judgment *by default* on the new assignment, and a verdict for the defendant upon all the issues, he is entitled to his costs upon such issues; and so it was determined in a case where the defendant pleaded three prescriptive rights of way, the issues on which were found for him (*c*). Again, where trespass was brought for breaking the plaintiff's house, the defendant pleaded not guilty as to the force and arms, &c. Secondly, a right of way at all times as to the residue, and thirdly, a right of way in the day time only. The replications traversed these claims; and issues were thereupon taken, and there was a new assignment upon which the defendant suffered judgment by default. There was a verdict for the defendant on not guilty, except, &c. and also on the second special plea claiming a right of way in the day-time. The plaintiff had a verdict on the first special plea with 1*s.* damages and 40*s.* costs, and nominal damages were assessed upon the new assignment. The master allowed the plaintiff the general costs of the trial. Upon a rule being discussed for the reviewing of this taxation, the court asked the defendant's counsel, how the plaintiff could have avoided going down to trial, when the plea claiming a right of way *at all times* was put upon the record, to which it was answered, that the plaintiff should have suffered judgment by default on the plea claiming the easement only in the day-time, and then, if the

(*a*) 2 Lev. 234, Asser v. Finch. 2 Str. 726, Higgins v. Jennings. S. C. 2 Lord Raym. 1444. 2 Str. 1168, Beale v. Moor.

(*b*) 1 East, 350, Martin v. Vallance. S. P. 3 B. & A. 443, Taylor v. Nicholls, where the above decisions were taken for settled law. Barnes 129, Ibbotson v. Brown. Hullock on Costs, Vol. I. p. 78, Cockerill v. Allanson, where the way was pleaded by metes and bounds, *contrà*. But the prior decisions are now acted upon. See, however, the observations of Mansfield, C. J. 4 Taunt. 100.

(*c*) 8 Term Rep. 466, Griffiths v. Davies. S. P. 9 Price, 336, Harber v. Rand, and see 3 Term Rep. 654, Day v. Hanks.

cause had gone to trial on the other issue on the right of way, the plaintiff would have been entitled to the general costs of the trial. The court being satisfied with that answer, made the rule absolute for a review of taxation (*a*). Here, it should be observed, that there was a judgment by default as to the new assignment, and a verdict for the defendant on a special plea, as well as not guilty, which covered all the trespasses mentioned in the declaration. Secondly, although the plaintiff is not entitled to have the costs of an issue found against him, yet the defendant is not allowed those costs; for where the plaintiff is said to be entitled to costs, those upon the issues found for the defendant being first deducted, it does not mean that they should be deducted from the costs allowed to the plaintiff, but from the general costs in the cause (*b*). Thus, where the issues on not guilty, on a right of way by grant, and on a new assignment *extra viam* were found for the plaintiff; but those on a right of way by prescription, and upon other questions on the new assignment for the defendant, by which the plaintiff became entitled to the general costs of the cause, the Court of Exchequer permitted only the disallowance to the plaintiff of the costs of the issues found against him, and would not accede to the application on the defendant's part, that the amount of the defendant's costs should be deducted from those of the plaintiff (*c*).

In an action of trespass, the plaintiff having discovered an error of the name of the parish, withdrew his record; the consequence of which was, that the defendant's witnesses, instead of being discharged on the first day of the assizes, were obliged to wait six or seven days, the cause having been removed from the top of the list almost to the bottom of it. The issues were determined thus:—the general issue (without damages), the issue, or *liberum tenementum* (without damages), and the issue on the new assignment, with 1*s.* damages, were found for the plaintiff, and a plea of right of way was found for the defendant. It was moved to allow the plaintiff the full costs of the cause, deducting the costs of the issue found for the defendant, by not allowing to the plaintiff any costs on that issue, and the court made the rule absolute, considering themselves bound by the current of authorities (*d*).

Where the costs in a cause are adjudged to the defendant, but the plaintiff having had some issue found for him, is entitled to the costs of that issue, such costs mean only the costs of the pleadings. It was so held, where a justification for a right of

(*a*) 13 East, 191, Thornton v. Williamson.
(*b*) See 2 Price, 139, by counsel arguendo.
(*c*) 2 Price, 136, Hopkins v. Barnes.
(*d*) 1 B. & B. 222, Trotman v. Holder. See 5 East, 261, Postan v. Stanway.

way had been found for the defendant (*a*); and Mr. Justice Park said upon that occasion, that where a plea which goes to the whole of the cause of action is found for the defendant, the costs of the cause go to the defendant, and the costs of the issues found for the plaintiff go to the plaintiff; but that by the costs of the issues, was meant the costs of pleadings only (*b*).

Judge's certificate.

With respect to the certificate of the judge in actions of trespass by virtue of the statutes 22 and 23 Car. II. it is only necessary to observe, that if a right of way be pleaded as a justification, that certificate is dispensed with; for there is then an admission upon the record, that the freehold may come in question. To use the words of a learned judge *, in a case where it was contended, that the defendant's deviating from the way involved no question as to the freehold: "It involves the question, whether the plaintiff has a freehold subject to an incumbrance" (*c*). But the award of an arbitrator is not tantamount to a judge's certificate, and so it was held, in a case of right of way, where the arbitrator awarded 5*s*. damages to the plaintiff, for an assault committed by the defendants while asserting those rights. To the particular count which alleged the assault, and to which the court referred the damages, *there was no justification* (*d*).

By the Birmingham paving act it was declared, that in all cases where a verdict should be found for any defendant in an action for any thing done pursuant to the act, &c. the defendant should recover treble costs. Where some defendants had judgment against them as commissioners under the act, and others had a verdict in their favour, it was held, that these last should have treble costs, although there had not been an entire verdict (*e*).

Staying proceedings till payment of costs in a former action.

The plaintiff declared in *assumpsit* against the trustees of a turnpike road generally; he went to trial, but withdrew the record, and after suffering a *non-pros*, sued the same trustees by name for the same cause of action. The court refused to stay the proceedings in this last action, until the costs of the former had been paid (*f*).

Inhabitants presented for non-repair.

Where a rule obtained by certain persons, inhabitants of a parish, to shew cause why a presentment against the inhabitants

(*a*) 1 Bing. 275, Othir v. Calvert.
(*b*) Id. 276.
* Bayley, J.
(*c*) In Taylor v. Nichols, 3 B. & A. 444.
(*d*) 3 Term Rep. 138, Swinglehurst v. Altham.
(*e*) 2 Bing. 267, Hall v. Smith.
(*f*) 3 D. & R. 53, Pashley v. Poole.

should not be discharged, was discharged with costs, the court granted an attachment against those persons for non-payment of the costs, and not against the inhabitants (*a*).

(*a*) 1 Smith, 168, Rex v. New Windsor Inhabitants.

ADDENDA.

CHAP. III. p. 27.] It is declared by the highway act, that if the driver of a cart, &c. refuse to disclose his name, or that of his owner, to a justice under the circumstances therein mentioned, he shall be punished. The driver of a waggon, having committed an offence against the act in the view of a justice, placed himself before the board on which his master's name was painted, upon which the justice stopped the horses, and laid hands on the driver in order to inform himself of the ownership. Upon a demurrer to a declaration in trespass for this assault by the justice, it was holden that the driver had a right of action (*a*). Owner's name painted on waggon, &c., under 13 Geo. III. c. 78. s. 60.

P. 58, at the bottom.] But a mandamus will not lie against commissioners for not setting out roads according to an act of parliament, unless their proceedings be manifestly unjust. The writ has been refused upon such an occasion (*b*). Mandamus.

P. 71, line 20, after "necessity."] So it is with respect to paths to a mill, for being very necessary, they shall revive as soon as the tenements come again to different hands (*c*).

P. 90.] Where the inhabitants of a parish submitted to a small fine, upon a certificate that the way was in repair, the prosecutor applied for costs, but the court refused them, saying that it would be contrary to the practice to allow them on such an occasion, and a fine of 6*s*. 8*d*. was set (*d*). No costs where inhabitants submit to a fine.

(*a*) 2 D. & R. 600, Jones v. Owen.
(*b*) Lofft. 189, Anon.
(*c*) 8 Mod. 272.
(*d*) 1 Sir Wm. Bl. 295, Rex. v. Cheshunt Inhabitants.

P. 124.] See 2 Y. & J. 243, in the matter of the Liverpool Street Act *ex parte* Whitehead.

Revenue of turnpike trusts.

P. 138.] By 1 Geo. IV. c. 95, general returns of the revenue of turnpike trusts were required.

P. 181.] See 5 Bingh. 286, Lord Falmouth v. George.

P. 189.] See Moo. & Malk. 214, Whitmore v. Wilks.

THE APPENDIX.

CONSISTING OF

I. FORMS.
II. PRECEDENTS OF INDICTMENTS AND PLEADINGS.

I. FORMS.

ALPHABETICALLY ARRANGED.

N.B. The figures I. II., *&c. refer to the corresponding numbers in the Schedule, or Appendix to each Act.*

Accounts, of Surveyors. See *Surveyors.*

Adjudication under 34 G. 3. c. 64. [Highways in two parishes. See p. 84.]

Final Order and Adjudication, to be filed with the Clerk of the Peace.

Whereas, &c.

1. *State the original application.*
2. *The summons.*
3. *The appearance; and that the parties were heard, or, their non-appearance.*

Now we, the justices aforesaid, have fully heard and understood the premises, do declare, adjudge, and order, that the said highway shall be divided in the following manner: (that is to say) that, at the distance of measuring from the place called *C.*, there shall be erected certain posts or stones, *E.* and *F.*, on each side of the said highway; and the whole of the said highway, from the place called *C.* to such posts or stones, shall be from time to time, and at all times hereafter, repaired by the parish of *A.*; and the whole of the said highway, from such posts or stones to the place called *D.*, shall from time to time, and at all times hereafter, be repaired by the parish of *B.*

In witness whereof we have hereunto set our hands and seals, this day of

J. P. (L. S.)
K. P. (L. S.)

Affidavit. Of Consent to Turnpike bill, under general turnpike act, 3 G. 4. c. 126. s. 152. See p. 128.

A. B. of maketh oath, and saith, that he did apply to *C. D.* whom he believes to be the owner of [*set out the Property*] being part of the lands through which the intended turnpike road from *E.* to *F.* is to be carried, or the alteration to be made [*as the case may be*] and that he received from such owners the answers set forth in the paper hereunto annexed.

(Signed) *A. B.*

Sworn [*or*, solemnly affirmed] before me [*as in the other forms hereinbefore set forth.*] As witness my hand and seal.

Affirmation. See *Oath.*

Agreement. See *Repair, Subscription, Weighing Engine.*

Appeal. General highway act. No. XL. see p. 185.

Notice of Appeal to the Quarter Sessions.

A. B. take notice, that I intend to appeal to the next general quarter sessions of the peace to be holden for the [*county, &c.*] of against an order, [*conviction, or other procceding, as the case may be, particularly specifying the purport of such order, &c. and assigning the grievance, and cause of complaint.*]

Dated the day of

G. D.

Appeal. General turnpike act, 3 G. 4. c. 126. No. XXIII. see p. 186.

Notice of Appeal to the Quarter Sessions.

A. B. Take notice, that I intend to appeal to the next general quarter sessions of the peace to be holden for the [*county, &c.*] of against an order [*conviction, or other proceeding, as the case may be, particularly specifying the purport of such order, &c. and assigning the grievance and cause of complaint.*]

Dated the day of

C. D.

Apportionment. See *Statute Duty.*

Assessment. General highway act. No. XIV. See p. 103.

Notice of Application to be made for an Assessment.

Middlesex. Notice is hereby given, that application will be made to the justices of the peace acting for the (*Hundred*) of in the said county, at their special sessions, to be held at in the said (*Hundred*) on the day of one thousand eight hundred for an equal assessment to be made, not exceeding in the pound, upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments, within the (*Parish, &c.*)

of for the use and benefit of the highways, within the said (*Parish, &c.*)

Dated this day of

A. B. Surveyor.

See *Warrant.*

Assessment, sixpenny. General highway act. No. IV. See Ch. VI.

Order to the (*constable*, &c.) to return to the Justices the amount of a Sixpenny Assessment.

Middlesex. *To the* (Constable, &c.) *of*

You are hereby required to return to us, and the other justices, to be assembled at the special sessions to be held at for the (*hundred*, &c.) of in the said county, on the day of next, the amount of the last assessment of sixpence in the pound, for the use of the highways within your liberty, if any such has been raised; if not, what you apprehend, from the best information you can get, an equal assessment of sixpence in the pound upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments, within the said liberty, according to their yearly value, will amount to.

Given under our hands this day of 18

General highway act. No. V. See Ch. VI.

Return to the Justices of the amount of a Sixpenny Assessment.

To the justices, assembled at their special sessions at the day of 18

In obedience to your order, I do return and certify, that the last assessment of sixpence in the pound, for the use of the highways within the liberty of amounted to the sum of

[*If no assessment of sixpence in the pound hath been made, then as under.*]

In obedience to your order, I do return and certify, that no assessment hath been made of sixpence in the pound, for the use of the highways, within the liberty of ; but I apprehend, from the best information which I have been able to get, that an equal assessment of sixpence in the pound, upon all the occupiers of lands, tenements, woods, tithes, and hereditaments, within the said liberty, will amount to the sum of

A. B. (constable, &c.)

General highway act. No. XV. See Ch. VI. and VII.

Order at a Special Sessions for an Assessment of Sixpence in the Pound.

Middlesex. *At a special sessions for the highways, held at in the hundred of in the said county, the day of* 18 *by justices of peace for the said county acting within the said hundred.*

Upon application made to us by the surveyor of the highways for the (*parish, etc.*) of and upon evidence given upon oath before us, (that the duty directed to be performed, and the money authorized to be collected and recceived, by an Act, passed in the thirteenth year of the reign of his majesty King *George* the Third, "for the amendment and preservation of the highways," have been performed, applied, and expended, according to the directions of the said act:) *Or,* (We are fully satisfied, that the common highways, bridges, causeways, streets, and pavements, belonging to the (*parish, etc.*) of are so far out of order, that they cannot be sufficiently amended and repaired, paved, cleansed, and supported, by the means prescribed by the said act:) And it appearing to us, that notice has been duly given of such intended application, according to the direction of the said act, we do hereby order, direct, and appoint, that an equal assessment, not exceeding the sum of in the pound, upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments, within the said (*parish, etc.*) of shall be forthwith made by the said surveyor, and shall be allowed by one justice of the peace for the said hundred, and shall be collected by the said surveyor, and that the money so to be assessed and collected shall be applied for and towards the amending, repairing, paving, cleansing, and supporting such highways, causeways, streets, pavements, and bridges, (*and for buying materials, making satisfaction for damages, erecting guide-posts, and paying the surveyor's salary,*) according to the direction and true intent and meaning of the said act.

If no assessment has been made for buying materials, &c. this may amount to nine-pence in the pound; but if a six-pence assessment had been made before, it must be only three-pence.

These latter words may be added here, if there has been no former assessment for those purposes.

A. B.
C. D.

Assistant Surveyors. See *Surveyors.*

Bonds from Surveyors. See *Surveyors.*

Bridges. See *Repair, Certificate.*

Certificate. See *Statute Duty.* General highway act. No. XVII. See p. 117.

Certificate from the said Justices to the Court of Quarter Sessions.

This is to be wrote upon

To the justices of the peace, at their general quarter sessions, to be held

at *in the said county, the*
day of 18 .

the above order, when no agreement can be made.

We, the within named *A. B.* and *C. D.* do hereby certify to the said court of quarter sessions, that we made and signed the within order, and that with our approbation, and by our direction, the said surveyor hath treated with the said and for the said lands required for the purposes aforesaid, but was not able to make any agreement for that purpose with them, or either of them; and that he tendered to the said the sum of and to the said the sum of as a recompense for the said ground, and for the making the said ditches and fences, which they, and each of them, refused to receive.

A. B.
C. D.

General highway act. No. XIX. See p. 60.

Certificate to be wrote under the Order above mentioned.

We, the above-named justices, do certify, that the old highway, hereinbefore mentioned and described, was sold by the said surveyor to with our approbation, for the sum of which sum we do order the said to pay to the said surveyor, to be applied in purchasing the land, and making the said new highway; and if any surplus remains, we do order that the same shall be applied for the use of the highways within the said (*parish, etc.*) of .

General highway act. No. XX. See p. 60.

Receipt for the Purchase-money to be indorsed upon, or wrote under, the Certificate above mentioned.

Received the day of from the said the sum of being the full consideration-money for the purchase of the said old highway hereinbefore described, pursuant to the said orders and certificate.

By justices under 52 G. 3. c. 110, that a bridge was in need of repair, &c. Burn's Justice, Vol. I. p. 391. See p. 212.

B. Certificate to be returned to the Sessions, pursuant to 52 Geo. 3. c. 110. § 2.

County of to wit. To the justices of the peace at the general quarter sessions, to be holden at , in the said county, the day of 18 . We and , two of his majesty's justices of the peace in and for the said county, duly appointed in pursuance of the statute in that

case made and provided, to superintend the county bridges, ramparts, banks, cops, and other works appertaining to the same, and the roads over the same, and so much of the roads at the ends thereof as by law is to be repaired at the expense of the said county, within the division or hundred of in the said county, do hereby certify to the said court of quarter sessions, that on the day of last, we did inspect the county bridge situate in the parish of in the said county, and within the division aforesaid, and it having appeared to us, on our own inspection thereof, that and that it was necessary for the purpose of preventing the further decay and injury of the same, to order the immediate repairs and amendments to be done to the same, as follows, *viz.* , therefore we the said justices, did, on the said day of , make our order, in writing, signed with our respective hands, and did thereby order and direct of the parish of in the said county of immediately to make the said repairs and amendments; provided that the sum to be expended in such repairs should not exceed the sum of pounds. And we, the said justices, do hereby further certify, that the said repairs, so directed to be made as aforesaid, have been made accordingly, by the said and that the reasonable price and charges payable to the said for the same, amounts to the sum of as per account hereto annexed, and verified on the oath of . Given under our hands, this day of , in the year of our Lord 18 .

That a road is in repair. Burn's Justice, Vol. II. p. 772.

M. m. a. Certificate of two justices, that an indicted road is in good repair.

Surrey to wit. We, two of his majesty's justices of the peace of the county of *Surrey*, acting in and for the said county, having this day viewed and examined the state and condition of the road said to have been indicted at the last summer assizes, (*or* at the last general quarter sessions of the peace) holden in and for the said county, leading from a place called *Biddle's Green* in the parish of *Windlesham*, in the said county, to a place called *Westley Green*, adjoining to the parish of *Cobham*, in the county aforesaid, do certify that the said road is well and sufficiently repaired, and is in such a state that the king's subjects with waggons, carts, coaches, and other carriages, may pass and repass safely and without inconvenience, and likely so to continue. Given under our hands and seals this day of 18 .

J. M. (L.S.)
J. L. (L.S.)

Witness *R. K.*

Commitment. See *Warrant.*

Compositions for statute duty. See *Statute Duty.*

Conveyances. Of lands sold by trustees of turnpike roads. General turnpike act amendment act, 4 G. 4. c. 95. s. 55. See p. 127.

Form of conveyances.

We, of the trustees or commissioners acting in execution of an act passed [*here insert the title of the act appointing them*] in consideration of the sum of to us paid by [*name of the purchaser*] do hereby grant and release to the said [*name of the purchaser*], all [*describing the premises to be conveyed*], and all our right, title, and interest to and in the same, and every part thereof, to hold to the said [*name of the purchaser*], his heirs, executors, administrators and assigns for ever, by virtue and according to the true intent and meaning of an act passed in the fourth year of the reign of king *George* the Fourth, intituled *An Act* [*here set forth the title of this act*]. In witness whereof we have hereunto set our hands and seals, this day of .

Conviction. Burn's Justice, Vol. II. p. 767. See p. 150.

I. i. Conviction on 13 G. 3. c. 78. § 48., of a surveyor of highways, for not delivering over his Books of Account to the churchwardens and overseers.

From Paley [64.]

County of *Stafford.* Be it remembered, that on the 27th day of *December*, in the year of our Lord 1819, at in the county of *Stafford*, *J. S.* came before me, *W. H.* one of his majesty's justices of the peace of the said county, and informed me that *W. B.* of the hamlet or division of *B.* in the township of *C.* in the said county, labourer, was surveyor of highways within the said hamlet, for the year ending at *Michaelmas* last past, and that afterwards, to wit, on the 25th day of *November* now last past, at *O.* in the county aforesaid, a certain book of the said *W. B.* as such surveyor, and certain assessments for repairs of the said highways, were settled and allowed by *J. H.* clerk, and *J. W.* esquire, two of his majesty's justices of the peace in and for the said county, pursuant to the statute in such case made and provided; and that afterwards, to wit, from thenceforth to the time of exhibiting the said information and complaint, there was a churchwarden and overseers of the poor duly appointed in and for the township of *C.* aforesaid, including the said hamlet or division, and that the said *W. B.* during all the time last aforesaid, neglected to transmit and deliver to such churchwarden and overseers, or any or either of them, the said book and assessments so settled and allowed as aforesaid, contrary to the form of the statute in such case made and provided: Whereupon the said *W. B.* after being duly summoned to answer the said charge, appeared before me on the day of , at in the said county, and having heard the charge contained in the said information, declared that he was not guilty of the said offence; but the same being fully proved upon the oaths of *J. S.* and *R. B.* two credible witnesses, it manifestly appears to me the said justice, that he the said *W. B.* is guilty of the offence

charged upon him by the said information. It is therefore considered and adjudged by me the said justice, that the said *W. B.* be convicted, and I do hereby convict him of the offence aforesaid, and I do hereby declare and adjudge, that he the said *W. B.* has forfeited the sum of *5l.* of lawful money of *Great Britain*, for the offence aforesaid, to be distributed as the law directs, according to the form of the statute in that case made and provided. Given under my hand and seal the day and year last aforesaid.

If the party does not appear upon the summons, then after the words " being duly summoned to answer the said charge," *insert* (" did not appear before me pursuant to the said summons)", *or if he appeared and refused to make defence,* (did neglect and refuse to make any defence against the said charge, but the same being fully proved, &c. as before.)

If the party confesses, after the words, " contained in the said information," *insert* (" acknowledged and voluntarily confessed the same to be true, and it manifestly appears to me the said justice, as above.")

Conviction. General highway act. No. XXXV. See p. 187.

Form of a Conviction.

Middlesex. } Be it remembered, that on the day of in the year of our Lord, 18 , at in the county aforesaid, *A. B.* came before me *C. D.* esquire, one of his Majesty's justices of the peace for the said county, and informed me, that *E. F.* of on the day of now last past, at in the said county, did [*here set forth the fact in the manner described by the statute*], whereupon the said *E. F.* after being duly summoned to answer the said charge, appeared before me on the day of at in the said county, and having heard the charge contained in the said information, declared, that he was not guilty of the said offence; but the same being fully proved upon the oath of *G. H.* a credible witness, it manifestly appears to me the said justice, that he the said *E. F.* is guilty of the offence charged upon him, in the said information: it is therefore considered and adjudged by me, the said justice, that the said *E. F.* be convicted, and I do hereby convict him of the offence aforesaid; and I do hereby declare and adjudge that he the said *E. F.* hath forfeited the sum of of lawful money of *Great Britain*, for the offence aforesaid, to be distributed as the law directs, according to the form of the statute in that case made and provided.

Given, &c.

After the words, being duly summoned to answer the said charge, *insert,* (did not appear before me, pursuant to the said summons); *or* (did neglect and refuse to make any defence against the said charge, but the same being fully proved, *&c.*), *as before.*

After the words, " contained in the said information," *insert* (acknowledged and voluntarily confessed the same to be true, and it manifestly appears to me the said justice, *&c.*) *as above.*

Conviction. General turnpike act, 3 G. 4. c. 126. No. XIX. See p. 187.

Form of Conviction.

County of to wit. Be it remembered, that on the day of in the year of the reign of and in the year of our Lord *A. B.* is convicted before me one of his majesty's justices of the peace, for the said county, for [*here specify the offence, and when and where committed,*] contrary to the form of the statute made in the year of the reign of intituled [*here set forth the title of the act,*] and I do hereby declare and adjudge that the said *A. B.* hath forfeited, for the said offence, the sum of [*or,* shall be committed to for the space of *as the case may be.*]

Given under my hand and seal the day and year first above written.

C. D.

Distress. See *Warrant.*

Diverting and turning highways. See *Highways.*

Drains. General highway act. No. XIII. See p. 83.

Order of a Justice of Peace to make new Drains.

Middlesex. *To* C. D. *of* *surveyor of the highways for the* (parish, *etc.*) *of* .

Whereas complaint hath been made to me *A. B.* esquire, one of his majesty's justices of the peace for the said county, that the ditch, gutter, or watercourse, for conveying the water from the highway at in the (*parish, etc.*) of in the said county, is not sufficient for that purpose, and that the cleansing and opening the same will not effectually carry off the said water, but that the said highway may be effectually drained, and the water carried off, by making a new ditch or drain through the lands or grounds of lying near the same, for the length of yards, and the breadth of feet; and the said having been duly summoned to appear before me, to shew cause, if he had any, why the said ditch or drain should not be made, and the said not appearing, *or* (not shewing sufficient cause against the same), and it appearing to me that such ditch or drain is necessary, I do hereby order and require you to enter into and upon the said lands of the said and there make, or cause to be made, a new ditch or drain, of the length and breadth aforesaid, and of a convenient depth, making or tendering sufficient satisfaction to the said for the damages to be done thereby, within one calendar month after the same shall be so made; such damages to be settled and ascertained in manner directed by the act, passed in the thirteenth year of the reign of his majesty king *George* the Third, 'for the amendment and preservation of the highways.'

Given under my hand, this day of 18 .

Forfeiture. See *Order, Warrant.*

General Statement of turnpike trust debts and credits. General turnpike act. 3 G. 4. c. 126. No. XXIV. See p. 138.

General Statement of the Income and Expenditure of the [*insert the Name of the particular Road*], between the day of and the day of .

EXPENDITURE.	£	s.	d.
To surveyor's account of day labour, between the day of and the day of for maintenance or repair of roads			
To surveyor's account of team labour, between the day of and the day of			
To surveyor's account for work executed by contract, specifying the amount done, and the rate of contract paid			
To surveyor's accounts for repair, or maintenance, or building of houses, gates or bridges			
To surveyor's account for land purchased, or for damages done			
To surveyor's account for rent of quarries			
To salaries and other payments of clerks, surveyors, or other officers			
To printing, advertising, and stationery			
To interest of debt			
To incidental charges			
£			

INCOME.	£	s.	d.
By balance in treasurer's hands			
By amount of rents received from the lessees, or tolls received from the gatekeepers, between the day of and the day of , as follows [*here specify the respective gates, and the different amounts received.*]			
By amount of statute labour, between the day of and the day of , as follows [*here specify the amount paid by each parish, hamlet, township, or place.*]			
By amount of money borrowed on security of tolls [*if any.*]			
By incidental receipts			
£			

GENERAL STATEMENT of Debts and Credits.

	£	s.	d.
An account of the amount of debt bearing interest			
An account of interest due			
An account of floating debt			
£			

	£	s.	d.
Arrears of rents [*or* tolls] due, not received, as under: *Insert the names of the lessees* [or *of gates*], *and when due. Also insert any other monies due to the trust on any other account.*			
£			

Guide Posts. General highway act. No. XXX. See p. 127.

A Precept for erecting Guide Posts, *etc.*

Middlesex. *At a special sessions, held at for the* (hundred) *of in the said county, before justices of the peace for the said county, acting within the said* (hundred), *on the day of* 18 .

To the surveyor of the (parish) *of in the said* (hundred).

You are hereby required forthwith to erect, or cause to be erected, in the most convenient place, upon the highway lying between and within your liberty, where the roads cross or branch out, a guide-post, with proper inscriptions painted on both sides thereof, in large legible letters, denoting the towns of and *(or other proper places, as the justices shall think most proper).*

[*Where graduated stones or posts are necessary to prevent accidents from deep waters, vary it as under:*]

[In the most convenient place upon the highway, at the approach or entrance on each side of the ford or water called at within your *(liberty)*, graduated posts, denoting the depth of water in the deepest part thereof, through which such highway passes; and you are allowed to charge the reasonable expenses of providing and erecting the same in your accounts.]

A. B.
C. D.

High Constable. See *Precept.*

Highways. See *Materials, New Highways, Precepts, Repair.*

Highways. General highway act. No. XVI. See p. 61.
See *Certificates.*

General highway act. No. XVIII. See p. 60.

Order for stopping up the old Highway, and selling the Land and Soil thereof.

We whose names are subscribed, being the justices of the peace who have viewed the several highways described in the plans hereunto annexed, and made an order for diverting the old highway; and being satisfied that the new highway therein described is properly made, and fit for the reception of travellers, do hereby order the said old highway, being of the length of yards, and of the breadth of feet, upon a medium, as appears by the said plan, to be stopped up, and the land and soil thereof to be sold by the said surveyor to whose land adjoins thereto, if he shall be willing to purchase the same, for the full value thereof, if not, to some other person or persons, for the full value thereof: (reserving nevertheless to a free passage for persons, horses, cattle, and carriages,

If there are more highways than one to be stopped up, there should be a separate order for each.

This to be inserted where necessary.

and to be varied as the circumstances of the case may require.

through the land and soil of the said old highway to and from the (*land, &c.*) belonging to him, called according to his ancient usage thereof.)

Highways. General highway act. No. XXI. See p. 118.

Order of two Justices for diverting and turning a (*public Highway, Bridleway,* or *Footway, as the case shall be*) through the Lands of any Person who consents thereto.

Middlesex. We, and , esquires, two of his Majesty's justices of the peace for the said county, at a special sessions held at in the hundred of in the said county, on the day of one thousand eight hundred , having, upon view, found, that a certain part of a *(highway, &c.)* within the *(parish, &c.)* of in the said hundred, lying between and for the length of yards, or thereabouts, and particularly described in the plan hereunto annexed, may be diverted and turned so as to make the same nearer *(or more commodious)* to the public; and having viewed a course, proposed for the new highway, in lieu thereof, through the lands and grounds of of the length of yards, or thereabouts, and of the breadth of feet, or thereabout, particularly described in the plan hereunto annexed, and having received evidence of the consent of the said to the said new highway being made through his lands hereinbefore described, by writing under his hand and seal, we do hereby order that the said highway be diverted and turned through the lands aforesaid; and we do order an equal assessment, &c. *(in the same form as before mentioned.)*

General highway act. XXII. See p. 119.

Consent from the Owners of the Land through which a new Highway is proposed to be made.

I *A. B.* of in the county of being owner of the lands described in the plan hereunto annexed, through which part of a certain highway, lying between and is intended to be diverted and turned, (in consideration of the sum of to be paid to me for the said land, and the soil thereof) *or,* (in consideration of said old highway being sold, exchanged, and to be vested in me, and also of the sum of to be paid to me,) *(as the case may be,)* do hereby consent to the making and continuing such new highway through my said lands.

Given under my hand and seal, this day of 18

Highways. Notice under 55 G. 3. c. 68. See p. 62.

Form of Notice.

Notice is hereby given, that on the day of last, an order was signed by *J. W.* and *T. H.* two of his Majesty's jus-

tices of the peace in and for the county of for [*if the order be for* turning, diverting and stopping up, &c. *here so state it, and describe the road ordered to be* turned, diverted and stopped up;—*if the order be for* stopping up a useless road, *here so state it, and describe the road ordered to be stopped up;*] and that the said order will be lodged with the clerk of the peace for the said county, at the general quarter sessions of the peace to be holden at in and for the said county, on the day of next, and also that the said order will at the said quarter sessions be confirmed and inrolled, unless, upon an appeal against the same to be then made, it be otherwise determined.

Horses. Burn's Justice, Vol. II. p. 778. See p. 31.

Z. z. Allowance of an increased number of Horses drawing up a steep Hill.

At a meeting of the trustees of a turnpike road, under an act passed in the year of the reign of for [*here state the principal part of the title of the act*] held at the day of 18 .

It appearing to us, upon the oath of being a person experienced in travelling, that the rise of a part of a certain hill, upon the said turnpike road, lying in the parish of called or known by the name of , between the post marked "*Put on*", and the post marked "*Take off*", being yards in length, is about four inches in a yard; we do hereby allow to be drawn up the said hill, between the posts above-mentioned, waggons having soles or bottoms of the fellies of the wheels of the breadth of nine inches with horses, and carts having the like wheels with horses, and waggons having wheels of the breadth of six inches with horses, and carts having the like wheels with horses, and waggons having wheels of less breadth than six inches with horses, carts having the like wheels with horses.

If the whole rise be upon an average more than four inches in *a yard, then say,* that the rise of a certain hill is upon an average above four inches .

A. a. a. Certificate thereof to the Sessions.

I *A. C.* clerk to the trustees mentioned in the above order, do hereby certify to the justices of the peace for the of at the general quarter sessions of the peace, that the above is a true copy of the order made by the said trustees, for the purposes herein mentioned. Dated this day of 18 .

Information. General highway act. No. XXXIV. See p. 183.

Information.

Middlesex. Be it remembered, that on the day

of 18 *A. B.* of in the said county, informeth and maketh oath before me one of his Majesty's justices of the peace for the said county, that of in the said county, [*here describe the offence, and if it is for default in performing statute-duty, state the duty required, and the notice given for that purpose, and the neglect according to the fact, and as near the words of the act as may be,*] contrary to the statute made in the thirteenth year of the reign of his Majesty king *George* the Third, " for the amendment and preservation of the highways ", which hath imposed a forfeiture of for the said offence.

A. B.

Taken and sworn, the day of before me,

Information. Under 34 G. 3. c. 62. Highways in two parishes. See p. 84.

See *Adjudication.*

Information.

County of . At a petty session, holden before *J. P.* and *K. P.* two of his Majesty's justices of the peace for the said county, this day of *J. S.* one of the surveyors of the highways of the parish of *A.* came before the justices aforesaid, and gave them to be informed, that there is in the said county a certain common highway, leading from *M.* to *N.*; and that there is a certain part of the said highway, that is to say, so much thereof as lies between a certain place called *C.* and a certain other place called *D.*, being in length [*as the case may be*] one side of which last-mentioned part of the said highway adjoining to the parish of *A.* lies within the said parish of *A.*, and is to be, and of right ought to be, repaired by the said parish of *A.*; and that the other side of the same part of the said highway adjoining to the parish of *B.* lies within the parish of *B.*, and is to be, and of right ought to be, repaired by the said parish of *B.*; and stating that the repair of such part of the said highway is very inconvenient to the parishes aforesaid, and the want thereof detrimental to the public: and therefore praying, that such part of the said highway may be allotted and apportioned for the repair thereof, by the justices aforesaid, to the said several parishes of *A.* and *B.*, in the manner directed by an act, passed in the thirty-fourth year of the reign of king *George* the Third, intituled, *an act, &c.*

(Signed) *J. S.*
One of the surveyors of the highways for the parish of *A.*

The above application was made to us the day and year first above written.

J. P.
K. P.

Information. General turnpike act, 3 G. 4. c. 126. No. XVIII. See p. 183.

Information.

County of to wit. Be it remembered, that on the day of *A. B.* of in the said county, informeth me one of his Majesty's justices of the peace for the said county, that of in the said county [*here describe the offence, with the time and place, and follow the words of the act, as near as may be*] contrary to the statute made in the third year of the reign of king George the Fourth, " for regulating turnpike roads ", which hath imposed a forfeiture of for the said offence.

Taken the day of before me, *A. B.*

Lists of persons liable to do statute labour on turnpike roads. General turnpike act, 3 G. 4. c. 126. No. IX. See p. 105.

Magistrates' Summons.

To the surveyors of the highways of the parish of in the county of .

Upon application made by surveyor of the turnpike roads from appointed by the trustees for putting into execution an act of parliament passed in the year of the reign of his Majesty king George the intituled " an Act " by order of the trustees for the said road to us, two of his Majesty's justices of the peace acting in and for the said county; we do hereby summon you, the surveyors of the highways of the parish or place of in the said county, to deliver a list to the said as such surveyor as aforesaid, at his house, situate in the said county, within days after the service of this summons, of the names of the several persons, inhabitants of the said parish or place, and who are by law subject and liable to do statute work for the present year upon the road situate in the said parish or place, or to the payment of any money in lieu of or as a composition for such statute work, distinguishing the nature of the work to be done, whether with teams or draughts or otherwise, and also the amount of the respective sums to be paid; and we the said justices do hereby require you to make such lists of names, in such manner and under such regulations and restrictions as is or are directed by any law or statute now in force and effect for the repair of the public highways.

And in case you shall refuse or wilfully neglect to give in such list as aforesaid, or shall knowingly or wilfully give in a false or imperfect list, you so offending will for every such offence forfeit and be liable to pay a sum not exceeding ten pounds.

Given under our hands and seals this day of in the year of our Lord, 182 .

General turnpike act amendment act 4 G. 4. c. 95. No. II.
See p. 105.

A List, containing the Names of all Persons in the Parish or Place of in the who are liable to do Statute Work, and to the Payment of Composition in lieu thereof, for the Year commencing from

(Signed)

Surveyors of the said Parish or Place.

1.	2.	3.	4.	5.	6.	7.
Names of Persons liable.	No. of Horses kept.	Full Annual Value.	Rate of Composition.	Total Amount liable in Money.	No. of Days' Duty Work.	General Observations.
		£ s. d.				

General turnpike act, 3 G. 4. c. 126. No. X.
See p. 105.

Notice to be given to Surveyors of Highways.

To the surveyors of the highways of the parish or place of in the county of .

I do hereby give you notice, that the list delivered by you to me as surveyor of the turnpike road from to in the said county of of the names of the several persons who within your said parish or place are by law liable to do statute work for the present year, or to the payment of money in lieu of or as a composition for such statute work, will be laid before two of his Majesty's justices of the peace for the said county, in pursuance of the directions of the act, passed in the year of his Majesty king George the , intituled " an act "
on the day of at in the said county, in order that such two justices may adjudge and determine what part or proportion of the statute work for the said year shall be done upon the said road, and also what proportion of the composition money shall be paid to the trustees of the said road, or to their treasurer. And I do hereby give you further notice, that I shall apply to the justices for [*one half, one third, as the case may be*] of the statute duty from your parish for this year, which according to the list delivered by you will be *(say)* days in the whole in composition

money. If you object to this division, you will in course appear, but if not, the same will be confirmed by the justices, if they think proper.

Dated this day of

Surveyor of the said turnpike road.

Materials for the repair of highways. Licence from justices to get them out of another parish. General highway act. No. XXIII. See p. 109.

Licences from Justices of Peace, at a Special Sessions to get Materials for the Repair of the Highways in another Parish, besides that wherein such Materials are to be employed.

Middlesex. *At a Special Sessions, held at for the* (hundred) *of in the said county, by justices of the peace for the said county acting within the said* (hundred), *on the day of* 18 .

It appearing to us, upon evidence, this day received, that sufficient materials cannot conveniently be had within the waste lands, common grounds, rivers, or brooks, nor in the inclosed lands or grounds lying within the (*parish, etc.*) of *A.* in the said (*hundred*), for the repair of the highways within the said (*parish, etc.*) nor in the waste lands, common grounds, rivers, or brooks, within the (*parish*) of *B.* adjoining to the said (*parish, etc.*) of *A.* we do hereby give our licence to the surveyor for the said (*parish*) of *A.* to search for, dig, get, and carry sand, gravel, chalk, stone, and other materials, within the inclosed lands or grounds of *C. D.* within the said (*parish, etc.*) of *B.* to be employed in the repair of the highways within the said (*parish*) of *A.* it appearing from evidence laid before us, that there are proper materials within the said lands for the purposes aforesaid, lying convenient to the said highways; and that after such materials shall be so taken, there will be sufficient left for the use of the highways within the said (*parish*) of *B.* upon the said surveyors making satisfaction and recompense for the same, in the manner directed by the act, passed in the thirteenth year of the reign of his majesty king *George* the Third, "for the amendment and preservation of the highways," subject to such restrictions as are therein contained.

Given under our hands and seals, the day and year above written.

A. B.
C. D.

Licence to surveyor from justices to get stones from inclosed lands. General highway act. No. XXIV. See p. 107.

Licence from a Justice of Peace, for a Surveyor to gather stones upon inclosed lands, for the Repair of the Highways.

Middlesex. *To the surveyor of the highways for the* (parish) *of*

in the (hundred) *of* *in the* *said county.*

Whereas by an act, passed in the thirteenth year of the reign of his majesty king *George* the Third, "for the amendment and preservation of the highways," the surveyors are authorized to gather stones lying upon any lands or grounds within their liberty, for the use and benefit of the highways, but not without the consent of the occupiers of such lands, or a licence from a justice of peace for that purpose: and whereas it appears to me, *E. F.*, one of his majesty's justices of the peace for the said county, and acting within the said (*hundred, etc.*) upon the oath of the said surveyor, that he hath applied to *A. B.* of for his consent to gather stones from the lands called or known by the names of and in his occupation, within the said (*parish, etc.*) for the purposes aforesaid, and that the said stones are necessary for the repair of the said highways, and that the said *A. B.* hath refused to permit the same to be gathered; and the said *A. B.* having been duly summoned to appear before me, to shew cause why such permission should not be granted, and (*having appeared before me accordingly*); or, (*having sent his steward or agent;*) or, (C. D. *on his behalf, to attend me upon that occasion;*) or, (*but not having appeared*) I have heard what has been alleged, and taken the said matter into consideration, and am of opinion, that the said stones are necessary, and ought to be gathered and carried away for the purposes aforesaid, therefore I do hereby give my licence to the said surveyor to take and carry away the same accordingly.

Given under my hand and seal, the day of 18

Surveyor's Application. Burn's Justice, Vol. II. p. 758.
See p. 107.

Q. 1. Surveyor's application to a justice of peace for his licence to take Stones for repairing the highways from lands being private property, on affidavit that the same are necessary for repair of the highways, and that the occupier, on request, had refused permission.

Middlesex to wit. Be it remembered, that on the day of , at , in the said county, *A. S.* surveyor of the highways within the parish of , in the said county, in his proper person, cometh before me, *J. P.* esq. one of his majesty's justices of the peace in and for the said county, and maketh complaint on oath, that he hath applied to *A. O.* of , for his consent to gather stones from the lands called , being the freehold of him the said *A. O.* and now in his actual occupation within the said parish of , and county of *Middlesex*, for the purpose of repairing and amending the highways within the said parish; and further upon his oath the said *A. S.* giveth me, the said justice, to understand and be informed, that the said stones are necessary materials for the repair of the said highways, and that proper materials cannot otherwise be procured, and that the said *A. O.* hath refused to permit the same to be gathered; wherefore the said *A. S.* prayeth the

consideration and order of me, the said justice, in the premises, according to the form of the statute in such case made and provided.

A. S.

Exhibited before me on the oath of the said *A. S.* the day and year first above written.

J. P.

Contracting for materials. Burn's Justice, Vol. II. p. 778. See pp. 107, 108.

B b b. Notice of contracting for Materials.

Notice is hereby given that *A. S.* surveyor of the turnpike road lying between and will on the day of next, at the hour of in the noon, let the getting of cart loads of gravel [*or*, of stone], to be got at a pit at for the use of the said turnpike road, and will also let the carriage of the said gravel (*or* stone) from the said pit to where the same is to be used and employed upon the said turnpike road. And all persons desirous of entering into a contract with the said surveyor, either for getting or carrying the said materials, are desired to attend at the time and place beforementioned. Dated this day of 18 .

Mortgage. Form of, under general turnpike act, 3 Geo. IV. c. 126. s. 81. See p. 174.

By virtue of an act passed in the year of the reign of intituled [*here set forth the title of this act,*] We, whose hands and seals are hereunto subscribed and set, being of the trustees [*or*, Commissioners] for putting into execution an act, passed in the year of the reign of intituled [*here set forth the title of the act under which the trustees or commissioners borrowing the money and granting the mortgage shall act*], in consideration of the sum of sterling advanced and paid by *A. B.* of to the treasurer of the said trustees [*or* Commissioners], do hereby grant and assign unto the said *A. B.* and his executors, administrators and assigns, such proportion of the tolls arising and to arise on the said turnpike road, and the toll gates and toll houses erected or to be erected for collecting the same, as the said sum of doth or shall bear to the whole sum now or hereafter to become due and owing on the security thereof: to have, hold, receive and take the said proportion of the said tolls, toll gates, toll houses and premises, with the appurtenances, unto the said *A. B.* and his executors, administrators and assigns, for and during the residue of the term for which the said tolls are granted by the said last mentioned act, unless the said sum of with interest after the rate of *per centum per annum*, shall be sooner repaid and satisfied.

Given under our hands this day of .

Mortgage. Assignment of under general turnpike act, 3 Geo. IV. c. 126. s. 81. See p. 175.

I *A. B.* [*or* I, *C. D.* assignee, executor or administrator of *A. B. as the case may happen*], do hereby assign and transfer this mortgage security, with all my right and title to the principal money thereby secured, and all interest now due and hereafter to grow due upon the same, unto *E. F.* his or her executors, administrators and assigns. Dated this day of one thousand eight hundred and .

Witness *G. H.* . (Signed) *A. B.* or *C. D.*

New Highways. Burn's Justice. Vol. II. p. 779. See Ch. VI.

D d d. Order for the repair of a new highway.

Middlesex to wit. We, two of his majesty's justices of the peace for the said county, acting within the (*hundred*) of in the said county, having, (at the request of the parties interested in the repair of part of the highway, [*or*, turnpike road, hereafter mentioned, who could not agree about the repair thereof) viewed a certain part of the highway (*or*, turnpike road) described in the plan hereunto annexed of the length of yards, which hath been set out and appropriated for a new highway (*or*, turnpike road) between and in lieu of an old highway (*or*, turnpike road) which hath been ordered to be stopped up; and having also viewed the ground where the said old highway was situated, and having summoned the surveyor of the said new highway (*or*, turnpike road) and also *A. B.* who was liable by tenure, &c. [*If the old road lay in a different parish, and was to be repaired by the inhabitants then say,*] and also the surveyor of the parish of where the said old road lay, who were liable to the repair of the said old highway (*or*, turnpike road) to appear before us this day; and having heard what has been alleged touching the repair of the said part of the said highway (*or*, turnpike road), and having fully considered the same, and all the circumstances of the case; We think it just and reasonable, and do hereby order and adjudge, that the said *A. B.* (*or*, the inhabitants of the said parish, *&c.*) shall from time to time repair, and keep in repair, the whole (*or*, a part) of the said highway, from to containing yards in length, at each end whereof we have caused a post or stone to be placed, to ascertain the extent thereof. Given under our hands and seals this day of 18 .

If it be agreed by the consent of parties, to pay a sum in gross in lieu of such repairs, then after the word adjudge, *insert,* by and with the consent of the said *A. B.* signified by his subscribing his name to this order (*or*, by the consent of the inhabitants of the said parish of signified in writing at a vestry or other public meeting, a copy whereof is here underwritten) that the said *A. B.* (*or*, the inhabitants) is (*or*, are) liable to repair part of the said new highway; and that if he (*or*, they) shall, on or before the day of next, pay to the surveyors of the highways of the

said parish of [*if it is not turnpike road, but if it be turnpike road, then say,* to the treasurer of the said turnpike road] the sum of he the said *A. B.* and his heirs (*or*, the said inhabitants and their successors) shall be for ever acquitted and discharged from the burden and obligation to repair the said new highway, or any part thereof.

Notice. See *Highway.*

Nuisances, removal of. See *Surveyors.*

Order for occupiers to make hedges, &c. Burn's Justice, Vol. II. p. 761. See p. 38.

U. Order for occupiers of land to make hedges, and cut down trees.

At a special sessions held at in the hundred of in the county of on the day of in the year of our Lord 18 *, by justices of the peace for the said county, acting within the said hundred.*

Staffordshire to wit. Whereas complaint hath been made unto us by *A. S.* surveyor of the highways of the parish of that *A. O.* of the said parish hath had due notice from him to cut, prune, and plash his hedges adjoining, and to cut down or to prune and lop the trees growing in and near such hedges, in such manner that the highways may not be prejudiced by the shade thereof, and that the sun and wind might not be excluded therefrom to the damage thereof (pursuant to the statute made in the thirteenth year of the reign of his majesty king *George* the Third), but that he hath not complied with such notice, or with the requisites of the said act.

And whereas the said *A. O.* having been duly summoned to answer the said complaint, hath made default in his appearance; Now we, upon duly considering the circumstances of the case, do order, that such hedges be cut, plashed, and pruned, so as not to exceed the height of from the surface of the field, and that all such trees as grow in and near such hedges, in the grounds occupied by the said *A. O.* near the said highway, be cut down, or be pruned and lopt, so that the sun and wind may not be excluded from such highway; and we do further order, that in case the said *A. O.* shall not obey this order within ten days from the date hereof, that then *A. S.* the said surveyor do cut, prune, and plash such hedges, and cut down or prune and lop such trees, in manner directed by this order, and proceed against the said *A. O.* immediately afterwards for recovery of the penalties and charges he will thereby incur.

Given under our hands and seals, the day and year first above written.

Oath. See *Surveyors.*

By trustees of turnpike roads, under 4 Geo. IV. c. 95. s. 32. See p. 131.

I *A. B.* do swear, [*or*, being one of the people called *Quakers*, do solemnly affirm,] that I will truly and impartially, according to the best of my judgment, execute and perform the several powers, authorities, and trusts reposed in me as a trustee [*or* Commissioner] by virtue of an act passed in the third year of the reign of his majesty king *George* the Fourth, intituled *an act to amend the general laws now in being for regulating turnpike roads in that part of* Great Britain *called* England; and also an act passed in the fourth year of the reign of his said majesty, intituled [*here set forth the title of this act;*] and also an act passed in the year of the reign of his majesty intituled [*here set forth the title of the act under which such trustee or commissioner shall claim to act.*] So help me GOD. [*Or, being a Quaker, omit the words,* So help me GOD.]

Obstructions, removal of. See *Surveyors.*

Order. Burn's Justice, Vol. II. p. 775. See p. 182.

S s. Order for payment of a Forfeiture.

Middlesex to wit. Whereas *A. O.* of in the said is duly convicted before me *J. P.* esquire, one of his majesty's justices of the peace for the said county, for that he the said *A. O.* [*Here describe the offence as set forth in the information*] whereby he the said *A. O.* hath forfeited the sum of : I do therefore hereby order the said *A. O.* to pay to *A. S.* surveyor of the said sum of to be by him disposed of as the law directs.

Given under my hand and seal the day of 18 .

Poor Labourer. Burn's Justice, Vol. II. p. 756. See p. 101.

K. Justices' notice to surveyor to shew cause why a poor labourer should not be discharged from highway rates or composition, by 34 G. 3. c. 74.

Herefordshire to wit. } To Mr. *A. B.* surveyor of the highways within the parish of , in the said county.

Whereas *E. F.* of , in your parish, labourer, hath this day made complaint on oath to us, two of his majesty's justices of the peace in and for the said county, in petty sessions assembled, that he wholly gains his livelihood by daily labour, and that by reason of his numerous family, he is in very poor and indigent circumstances, and utterly unable to pay or contribute towards any rates, assessments, or

composition, for or in respect of any highways within the said parish, and hath prayed of us, the said justices, that he may be exempted from paying the same. We the said justices do therefore hereby give you notice to appear before us at , in the said county, on Thursday, the day of , at our petty sessions, to be then and there held, to shew cause why the said *A. B.* should not by us be adjudged to be exempted from the payment of such rates, assessments, or compositions accordingly.

Given under our hands and seals, &c.

Precepts. Burn's Justice, Vol. II. p. 782. See Ch. VI.

H h h. Justices' precept to the surveyor to make a return of the state of the highways.

To the surveyor of the highways of the of in the county of Stafford.

Staffordshire to wit. These are in his majesty's name, and in pursuance of the statutes to require you forthwith to take a view of all the roads, common highways, bridges, causeways, pavements, hedges, ditches and water-courses, appertaining to, and of all nuisances and encroachments made upon the highways in your said parish of which you are surveyors, and to make a return in writing upon oath at a special sessions appointed to be held at , on the day of , at twelve o'clock at noon, of the state and condition of such highways, and more especially of such faults and defects therein as want to be amended and repaired, and of the neglect of labourers and teams for the amending such highways, and of those that are obliged to find labourers for the use aforesaid, of which you are not to fail.

Given under our hands and seals this day of in the year of our Lord 18 .

J. C.
S. P.

I i i. Surveyors' return of the state of the highways.

Staffordshire to wit. *A. B.* and *C. D.* surveyors of the highways for the parish of , do hereby certify, that we have in pursuance of a warrant to us directed, taken a view of all the roads, highways, &c. within our said parish, and that the same are in good repair, that his majesty's subjects may pass and repass without danger, and that there are no nuisances or encroachments thereon.

Sworn the day of 18 , before us,

J. C.
S. P.

K k k. High constable's precept to petty constables to issue precepts for surveyors to make returns as to the state of the roads.

To the constable of .

Staffordshire to wit. By virtue of a precept from his majesty's justices of the peace acting in and for this county, to me directed, you are hereby required forthwith to give notice to the surveyors of the highways within your precinct, that they must attend in person at a special sessions to be held at , on the day of at o'clock in the noon, and make a return in writing of the state of their highways, and of their having duly collected the compositions and called in the statute duty, and of all persons making default therein. And you are then and there to attend, and make a return of your due execution hereof, and of all things presentable belonging to your office, and inquirable at the next quarter sessions. Herein fail not at your peril.

Given under my hand this day of 1820.

Presentment. General highway act. No. XXXII. See p. 88.

Presentment by a Justice of Peace.

Middlesex. At the general quarter sessions of the peace of our lord the king, held for the said county at in the said county, on (*Tuesday*) the day of in the year of the reign of before esquires, and others their companions, justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county committed; *A. B.* esquire, one of the justices of our said lord the king, assigned for the purposes aforesaid, by virtue of an act, made in the thirteenth year of the reign of his majesty king *George* the Third, "for the amendment and preservation of the highways," (upon his own view), *or* (upon information, upon oath, to him given by *C. D.* surveyor of the highways for the (*parish, etc.*) of in the said county,) doth present that from the time whereof the memory of man is not to the contrary, there was, and yet is, a certain common and ancient king's highway leading from the town of in the said (*county, etc.*) towards and unto within the same (*county,*) used for all the king's subjects, with their horses, coaches, carts, and carriages, to go, return, and pass, at their will; and that a certain part of the same king's common highway, commonly called situate, lying, and being in the (*parish, etc.*) of in the same (*county*), containing in length yards, and in breadth, feet, on the day of in the year of the reign of and continually afterwards until the present day, was, and yet is, very ruinous, deep, broken, and in great decay, for want of due reparation and amendment, so that the subjects of the king, through the same way, with their horses, coaches, carts, and carriages, could not, during the time aforesaid, nor

This is to be inserted where it is upon information of the surveyor.

yet can, go, return, or pass, as they ought and were wont to do, to the great damage and common nuisance of all the king's subjects through the same highway, going, returning, or passing, and against the peace of our said lord the king, and that the inhabitants of the (*parish, etc.*) of aforesaid, in the (*county*) aforesaid, the said common highway (*so in decay*) ought to repair and amend, when and so often as it shall be necessary.

In testimony whereof, the said *A. B.* to these presents hath set his hand and seal, this day of in the year aforesaid.

Repair of Highway. See *Agreement, Certificate, Materials, New highway, Statute duty, Presentment, Subscriptions.*

Repair of Highway. General highway act. No. XXIX. See p. 88.

Order of the justices at their Special Sessions, for the Repair of certain Highways which most want Repair.

Middlesex. *At a special sessions, held at in the* (hundred) *of in the said county, the day of* 18 , *by justices of peace for the said county acting within the said* (hundred.)

To the surveyor of the highways for the (parish, *etc.*) *of in the said* (hundred.)

It appearing to us, that the highway, lying between and within your liberty, is very founderous, and in bad repair, and being of great public use, we do hereby order that you repair, or cause the same to be repaired, before the day of next.

Given under our hands and seals, this day of 18 .

Repair of Turnpike Roads. General turnpike act, 3 Geo. IV. c. 126. No. VIII. See p. 93.

Agreement between the Trustees of a Turnpike Road and a Person liable by Tenure to repair some part of it.

At a Meeting of the Trustees of the turnpike roads, under an act passed in the year of the reign of King George the "For [*state the principal part of the title of the act*], held at the day of .

Whereas *A. B.* of is liable by tenure, &c. [*as the case shall be*] to the repair of a certain highway leading between and of the length of yards or thereabouts, and the said highway being now made turnpike road by virtue of the said act, will occasion a greater expence to make and keep the same

in proper repair, than would have been necessary if no such act had been obtained, and the said *A. B.* attending this meeting in person, [*or*, by *C. D.* his attorney or agent authorized to treat in his behalf], the said trustees and the said *A. B.*, &c. in pursuance of a power given by an act passed in the third year of the reign of king George the Fourth, 'for Regulating Turnpike Roads,' have, in order to put and keep the said road in proper condition and repair, come to the following agreement, videlicet; that the said trustees shall on or before the day of next, pay and allow the sum of out of the tolls arising upon the said turnpike roads towards putting the said road into proper repair, to be laid out and expended by the surveyor of the said turnpike road, and that the said *A. B.* shall advance and pay into the hands of the treasurer of the said turnpike road on or before the day of next, the sum of to be also laid out and expended by the said surveyor in the repair of the said road, and that from and after the next, the said turnpike road shall be kept in repair by the said trustees out of the said tolls as aforesaid, so long as the said turnpike act shall continue, upon the said *A. B.* paying into the hands of their treasurer the sum of upon the in every year, which the said *A. B.* doth hereby for himself and his heirs agree to pay accordingly, so long as the said road shall be so repaired by the said trustees as aforesaid.

[*Or, if it shall be agreed that A. B. shall keep the road in repair upon having an annual allowance in money or statute duty from the said trustees, let the agreement be varied and adapted to the case.*]

Repair of Bridges. See *Certificate.*

Burn's Justice, Vol. I. p. 390. See p. 212.

A. Order of Two Justices to repair a County Bridge, under stat. 52 Geo. 3. c. 110. § 1.

County of to wit. To of the parish of in the said county. We and two of his majesty's justices of the peace in and for the said county, duly appointed in pursuance of the statute in that case made and provided, to superintend the county bridges, ramparts, banks, cops, and other works appertaining to the same, and the roads over the same, and so much of the roads at the ends thereof as by law is to be repaired at the expense of the said county, within the division or hundred of in the said county, having on this day inspected the county bridge situate in the parish of in the said county, and within the said division or hundred, and it appearing to us, on our own inspection thereof, to be necessary for the purpose of preventing the further decay and injury of the same, to order the immediate repairs and amendments to be done to the same, as in the schedule of particulars by you prepared and signed, and hereto annexed; now, therefore, we, the said justices, do hereby order and direct you, immediately, to repair and amend the said county bridge, according to the said schedule of particulars by you prepared and signed, and hereto annexed, provided that the sum to be expended in such repairs shall not exceed the sum of . Given under our hands this day of 18 .

Return. See *Warrant of Distress.*

Side-Gate. General turnpike act, 3 G. 4. c. 126. No. IV. See p. 178.

Notice of a Meeting of Trustees for ordering a Side-Gate to be erected.

Notice is hereby given, that the trustees of the turnpike roads under an act passed in the year of the reign of king *George* the "For [*state the material parts of the title of the act,*] will meet at the house of at on the day of next, at the hour of in the noon, in order to consult about erecting a toll gate on the side of the said turnpike road, at or near a place called across a certain highway there, leading to

Dated the day of

A. B. clerk to the said trustees.

General turnpike act. 3 G. 4. c. 126. No. V. See p. 178.

Order of the Trustees for erecting a Side Gate.

At a Meeting of the trustees of the turnpike roads, under an act passed in the year of the reign of king *George* the "For [*here state the material parts of the title of the act*], being assembled this day of to enforce the directions of an act passed in the Third year of the reign of king *George* the Fourth, "for regulating Turnpike Roads," [*as far as the same respects the erecting of side gates.*]

In pursuance of public notice given in writing upon all the toll gates erected on the said road, and also in the newspapers circulated in this part of the country, for fourteen days now last past, We do order, that a toll gate shall be erected on the side of the said turnpike road, at or near a place called across a certain highway there, leading to and that the following toll be taken at the said gate, videlicet, [*here insert the particular tolls to be taken at the said side gate.*]

Sixpenny Assessment. See *Assessment.*

Statute Duty. See *List. Poor Labourer.*

Statute Duty. General highway act. No. XXV. See p. 97.

Notice to perform Statute duty, (to be given four days before the day on which the duty is to be performed.)

A. B. you are hereby required to send a team, with two able men, to within the (*parish, etc.*) of next, If he does not occupy lands, &c. of

the yearly value of 30*l.* in such parish &c., he is only to send one man. If a waggon or a cart with two horses, or one horse only, is required, let it be expressed.

at o'clock in the morning of each day, in order to perform such duty upon the highways within the said as shall be required by the surveyor, pursuant to the direction of the act, passed in the thirteenth year of the reign of his majesty king *George* the Third, "for the Amendment and Preservation of the Highways." (*When personal labour is required*), You are hereby required, by yourself, or a sufficient labourer, to attend, *etc.*

Dated this day of 18

General highway act. No. XXVII. See p. 102.

Order for Statute-duty to be performed in kind.

Middlesex. *At a special sessions, held at in the* (hundred) *of in the said county, the day of* 18 *by justices of the peace for the said county, acting within the said* (hundred).

It appearing to us, from the information which we have received, that there will be difficulty in procuring the necessary (*carriage*), or, (*a sufficient number of labourers*) (*as the case shall be*) for the repair of the highways within the (*parish, etc.*) of within the said (*hundred*) without paying high and extravagant prices for the same, we do hereby order and direct (the team-duty within the said (*parish, etc.*) except such teams where the owners thereof do not occupy lands, tenements, woods, tithes, or hereditaments, within the said (*parish, etc.*) of the annual value of thirty pounds), or, (one half of the team-duty, *etc.*) or, the labourers liable to perform statute-duty within the said parish, *etc.* (as the case shall be) to perform their statute-duty in kind within the said (*parish, etc.*) according to the authority and directions of the act, passed in the thirteenth year of the reign of his majesty king *George* the Third "For the Amendment and Preservation of the Highways."

General highway act. No. XXVIII. See p. 103.

Notice to the Surveyor of the times fixed by the Inhabitants for being excused from doing their Statute-duty.

To the surveyor of the highways for the (parish, *etc.*) *of in the county of* .

I *A. B.* (*constable*) (*headborough*) (*tithingman,*) of the said (*parish, etc.*) do hereby give you notice, that the inhabitants of the said (*parish, etc.*) did, at a vestry or public meeting, held on the day of one thousand eight hundred agree to take the benefit of the indulgence of three months, for not performing their statute-duty given by the legislature, in the act passed in the thirteenth year of the reign of his majesty king *George* the Third, "for the Amendment and Preservation of the Highways," at the times following, *videlicet*, that they shall not be called upon to perform such duty between the day of and the day of (which they consider

as the seed month), nor between the day of and the day of (which they consider as the hay harvest month), nor between the day of and the day of (which they consider as the corn harvest month): [*The like notice to be given to the surveyor or surveyors of the turnpike roads, where there are any such within the* (parish,) *etc.*]

General highway act. No. XXXI. See p. 103.

Notice for holding a Vestry, or other public Meeting.

Notice is hereby given, that a vestry or public meeting will be held at on the day of next, at the hour of in the noon, in order to consult about the times when it will be most convenient for the inhabitants of this (*parish, etc.*) to be excused from being called forth to perform their statute-duty, according to the indulgence given them by the act, passed in the thirteenth year of the reign of his majesty king *George* the Third, "for the Amendment and Preservation of the Highways."

Dated the day of 18 .

A. B. (constable,) (headborough,) *etc.*

General turnpike act. 3 G. 4. c. 126. No. XI. See p. 105.

Justices' Order, apportioning Statute Labour.

to wit. We, two of his majesty's justices of the peace, acting in and for the county of upon application by the surveyor appointed by the trustees of the turnpike road from to in the said county, in pursuance of an act of parliament, passed in the year of the reign of his majesty king *George* the intituled *An Act for* do adjudge and determine that the inhabitants of the parish of in the said county of shall do part or proportion of the statute work for the ensuing year upon such turnpike road in the said parish of being a parish in which the said road lies, and that proportion of the money received by the surveyor or surveyors of the highways of such parish or place, in lieu of or as a composition for such statute work, shall be by him or them paid to the said trustees of the said turnpike road, or to their treasurer, or other person authorized by them to receive the same, on or before the day of ; the names of the several persons appointed to do such proportion of the statute work on the said turnpike road appear in the schedule to this order.

Given under our hands the day of 18

(Signed)

General turnpike act. 3 G. 4. c. 126. No. XII. See p. 106.

Order of Justices at a Special Sessions to take part of the Statute Duty from Turnpike Roads, for the Benefit of the other Highways in the said Parish, &c.

County of to wit. At a Special Sessions held by the justice of the peace for the said county acting in the [hundred] of within the said county, at on the day of .

Whereas application and complaint upon oath has been made unto us by *A. B.* [surveyor of the parish, &c.] of that the several highways, not being turnpike, within the said [*parish, etc.*] are very extensive and in bad repair, and that a considerable part of the statute duty arising within the said [*parish, etc.*] hath been called forth and required to be applied in the repair of certain turnpike roads lying within the said [*parish, etc.*] which are in good condition, and have a considerable revenue for their support, arising from the tolls collected thereupon; and we having duly summoned *C. D.* the surveyor of the said turnpike road to appear before us, to shew cause why the said statute duty called forth and applied by him to the repair of the said turnpike road, should not be withdrawn therefrom and applied to the repair of the other highways within the said [*parish, etc.*] and upon hearing the said *C. D.*, and receiving an account of the revenues and debts of the said turnpike road, and of the state and condition of the repair of the said turnpike road and highway respectively; and it appearing to us, upon full consideration had thereupon, that part of the statute duty hitherto employed by the said [*parish etc.*] for the repair of the said turnpike road may be conveniently dispensed, without endangering the securities for the money advanced upon the credit of the tolls thereof, and that such statute duty is wanted for the repairs of the other highways within the said parish; We, in pursuance of the power given to us by the act passed in the third year of the reign of king *George* the Fourth, "for Regulating Turnpike Roads," do order that from and after the day of next, there shall be only [one] day's statute duty performed by the inhabitants of the said [*parish, etc.*] upon the said turnpike road within the same, and that the remainder of the statute duty shall be performed upon the other highways within the said [*parish, etc.*]

[*If there are more turnpike roads than one, or the whole statute duty shall be thought fit to be taken away, this form must be varied to fit those cases; the summons to the surveyors will be very easily formed from this order.*]

General turnpike act, 3 G. 4. c. 126. No. XIII. See p. 106.

Certificate of the above Order to the Justices of the Peace at their Quarter Sessions.

I *A. B.* clerk to the trustees mentioned in the above order, do hereby certify to the justices of the peace for the [*county*] [*riding*] [*division*] of

at their general quarter sessions of the peace, that the above is a true copy of the order made by the said trustees for the purposes therein mentioned.

Dated this day of

A. B.

Statute-duty Compositions. General highway act. No. XXVI. See p. 101.

Notice for Compositions.

Notice is hereby given, that all persons who are inclined to compound for their statute-duty within the (*parish, etc.*) of are hereby required to signify their intention to compound for the same to the surveyor of the highways for the said (*parish, etc.*) at the house of of on the day of this instant between the hours of and and they are hereby required, at the same time, or within the space of one month after, to pay their composition-money to the said surveyor; and also, that all persons who are liable to pay money for the lands, tenements, woods, tithes, and hereditaments, which they occupy, or, in lieu of their duty within the said (*parish, etc.*) according to the act made in the thirteenth year of his majesty king *George* the Third, "for the Amendment and Preservation of the Highways," are required to pay the same to the said surveyor, on the day, or within the time aforesaid.

Dated this day of 18 .

A. B. surveyor.

Stopping up Highways. See *Highways.*

Subscriptions. General turnpike act. 3 G. 4. c. 126. No. XIV. See p. 176.

Agreement by Subscription for advancing Money to make and repair a Turnpike Road or Highway.

We whose names are subscribed, do agree to advance and pay the several sums wrote by us opposite to our names, unto to be laid out and expended in the making and repairing a certain highway leading from to after an act of parliament shall be obtained for making the same turnpike road, upon having the tolls to be collected upon such turnpike road assigned and made over to us as a security for the respective sums so to be advanced by us, together with interest for the same after the rate of per centum per annum, which sums we do hereby severally agree to pay by instalments, in the following manner, *videlicet;* one fourth part on the day of next; one other fourth part, [*&c. &c. &c.*]

Dated this day of

Summons. See *Horses.*

General highway act. No. XXXIII. See p. 182.

Summons for any Person or Persons to attend a Justice or Justices.

Middlesex. *To* A. B. *of*

Whereas complaint and information hath been made upon oath before me *C. D.* one of his Majesty's justices of the peace for the said (*county, &c.*) by *E. F.* of that, *etc.* [*Here state the nature and circumstances of the case as far as it shall be necessary to shew the offence, and to bring it within the authority of the justice, and in doing that, follow the words of the act as near as may be.*] These are therefore to require you personally to appear before me, (or the justices, to be assembled at their special sessions to be holden) at in the said (*county, etc.*) on the day of next, at the hour of in the noon, to answer to the said complaint and information, made by the said *E. F.* who is likewise directed to be then and there present, to make good the same: Herein fail not.

Given under my hand and seal, this day of 18 .

Burn's Justice, Vol. II. p. 772. See p. 101.

N n. Summons for non-payment of assessment.

To *A. O.* of the of in the county of Stafford.

County of *Stafford* to wit. Whereas complaint and information have been made upon oath before me, one of his majesty's justices of the peace for the said county, by the surveyor of the highways for the said , that by a rate or assessment duly made, allowed, and published, according to the statutes in that case made and provided, the sum of was duly rated and assessed upon you, for and towards the amending, repairing and supporting the highways within the said . These are, therefore, to require you personally to appear before me (or such other of his majesty's justices of the peace as shall be present) at in the said county, on the day of at the hour of in the noon, there to answer to the said complaint and information, and to shew cause why the said sum should not be levied on your goods and chattels pursuant to the said statute. Herein fail not.

Given under my hand and seal this day of in the year of our Lord one thousand eight hundred and .

Summons, under 34 G. 3. c. 64. Highways in two parishes. See p. 84.

Summons, to be subjoined to a Copy of Information.

County of . To the surveyors of the highways of the parish of *B.* in the said county, any or either of them.

Whereas a certain information has been given to us *J. P.* and *K. P.* two of his majesty's justices of the peace for the said county, by *J. S.* one of the surveyors of the highways of the parish of *A.* in the said county, a true copy whereof is above written; these are, in his majesty's name, to summon you, any or either of you, to appear before us at in the said county, on the day of at to shew cause (if any) why an allotment and apportionment of the highway therein mentioned should not be made, according to the provisions of the act referred to in the said information. Hereof fail not.

Given under our hands, this day of

J. P.
K. P.

See *Adjudication.*

Summons. General turnpike act. 3 G. 4. c. 126. No. XVII. See p. 182.

Summons for any Person or Persons to attend a Justice or Justices.

County of to wit. To *A. B.* of

Whereas complaint and information has been made before me, *C. D.* one of his majesty's justices of the peace for the said [county, &c.] by *E. F.* of That, &c. [*here state the nature and circumstances of the case, as far as it shall be necessary to shew the offence, and to bring it within the authority of the justice, and in doing that, follow the words of the act, as near as may be.*] These are therefore to require you personally to appear before me [*or*, the justices to be assembled at their special sessions to be holden] at in the said [county, &c.] on the day of next at the hour of in the noon, to answer to the said complaint and information made by the said *E. F.* who is likewise directed to be then and there present, to make good the same. Herein fail not.

Given under my hand, this day of

Surveyors. See *Conviction, Information, Materials, Lists, Precepts.*

Surveyors. Appointment of. General highway act. No. I. See p. 142.

Warrant for calling the Meeting of Householders, &c. and for fixing that of the Justices for appointing Surveyors.

Middlesex. *To the constables, headboroughs, and tithingmen, within the* (hundred, riding, division, liberty, *or* precinct), *as the case shall be of in the said county.*

In order to carry into execution an act made in the thirteenth year of the reign of his majesty King *George* the Third, *for the Amendment and Preservation of the Public Highways*, you are hereby severally required forthwith to give public notice to the churchwardens, surveyors of the highways, and householders, being assessed to any parochial or public rate within your respective liberties, that they do assemble on the day of next, at the church or chapel, or if there shall be no church or chapel, then at the usual place of public meetings within their respective liberties, at the hour of eleven in the forenoon; and that the major part of them so assembled do make a list of the names of at least ten persons living therein, who each of them have an estate in lands, tenements, or hereditaments, lying within the same, in their own right, or in right of their wives, of the value of ten pounds by the year; or a personal estate of the value of one hundred pounds; or are occupiers or tenants of houses, lands, tenements, or hereditaments, of the yearly value of thirty pounds: And if there shall not be ten persons having such qualifications, then that they do insert in such list the names of so many of such persons as are so qualified, together with the names of the most sufficient and able inhabitants not so qualified, as shall make up the number ten, if so many can be found, if not, so many as shall be there resident, to serve the office of surveyor of the highways: And you are also severally required, within three days after making the said list, to deliver a copy thereof to one of the justices of peace of the said (*hundred*) (*riding*) (*division*, &c. *as the case shall be*) living in or near the same (*parish*, &c.); and also to give personal notices to, or cause notices in writing to be left at the places of abode of the several persons contained in such list, informing them of their being so named, to the intent that they may severally appear before the said justices at their special sessions to be holden at within the said (*hundred, etc.*) on the day of now next ensuing, at the hour of in the forenoon of the same day, to accept such office, if they shall be appointed thereto, or to shew cause, if they have any, against their being appointed; and you are likewise to give notice to the present surveyors of the highways, within your respective liberties, to appear at the same time and place, and produce such accounts and lists before the said justices as are required by the

said act; and you, and each of you, are personally to appear before the said justices, at their said special sessions, and then and there severally deliver to the said justices the said original list or lists taken within your respective liberties, and give an account of the execution of this our precept.

Given under our hands and seals, the day of in the year of our Lord, 18 .

General highway act. No. II. See p. 143.

List of Persons to be returned to the Justices.

A List of the several persons named for Surveyors of the highways for the (insert the name of the parish, township, or place) *at a meeting held at in the said* (parish, &c.) *the day of* 18 .

A. B.
C. D. &c.

We whose names are subscribed, being two parts in three of the persons assembled at the meeting aforesaid, do agree in the choice of *A. B.* as a fit person to serve the office of surveyor for the (*insert the parish*, &c.) aforesaid, and in the allowance to him of for his trouble in executing the same for the year ensuing; and we do recommend the said *A. B.* to the justices for their appointment accordingly.

This to be added, when a particular person is recommended.

General highway act. No. III. See p. 143.

Notice to the Persons contained in the List.

A. B. take notice, that you was at a meeting held at (*insert the name of the parish*, &c.) on the day of named as one of the persons to be returned to the justices as fit to serve the office of surveyor for the said (*parish, etc.*) for the year ensuing; and if you have any cause to shew why you should not be appointed to serve such office, you must make the same appear before the justices, at their special sessions, to be holden at on the day of next.

A.B. { Constable, / Headborough, or / Tithingman, / (*as the case shall be.*)

General highway act. No. VI. See p. 143.

Appointment of a Surveyor.

Middlesex. *At a special sessions, held at in the hundred of by justices of the peace for the said county acting within the said hundred, on the day of* 18 .

This is to be inserted when a surveyor is appointed with a salary.

We do hereby nominate and appoint *A. B.* of (*insert the name of the parish, &c. where he lives*) in the said hundred, surveyor (*or* surveyors) of the highways within the said (*parish, etc.*) for the year ensuing; (and we do allow the said *A. B.* the salary of for his trouble): And you the said *A. B.* are faithfully and truly to execute the said office of surveyor, according to the directions of the statute, passed in the thirteenth year of the reign of his majesty King *George* the Third, "for the Amendment and Preservation of the Highways," an abstract of the material parts of which statute is hereunto annexed.

Given under our hands and seals, the day and year above mentioned.

Surveyors. When appointed with a salary. See *Assessment.*

Surveyors. Bond from, upon their appointment.

General highway act. No. VII. See p. 145.

Bond from the Surveyor.

We *A. B.* surveyor of the highways for the (*parish, township, etc.*) of and *C. D.* of are bound to *E. F.* of aforesaid, in the sum of pounds, to be paid to the said *E. F.*, his executors, administrators, or assigns: for which payment we hereby bind ourselves severally, and each of our heirs, executors, and administrators.

Dated the day of 18 .

The condition of this bond is such, that if the said *A. B.*, his executors, or administrators, shall duly and faithfully account for, apply, and pay, all and every the sum and sums of money which shall come to his hands, as surveyor of the highways for the (*parish, etc.*) according to the direction and true intent and meaning of the statute, made in the thirteenth year of the reign of his majesty King *George* the Third, "For the Amendment and Preservation of the Highways," then this bond to be void, or else to remain in full force.

General turnpike act, 3 G. 4. c. 126. No. XVI. See p. 141.

Bond from the Surveyor.

We, *A. B.*, surveyor of the turnpike roads, under an act passed in the year of the reign of King *George* the "For [*state the principal part of the title of the act*], and *C. D.* of , are bound to *E. F.*, of , in the sum of pounds, to be paid to the said *E. F.* his executors, administrators, and assigns, for which payment we hereby bind ourselves severally and each of our heirs, executors, and administrators.

Dated the day of .

The condition of this bond is such, that if the said *A. B.*, his executors or administrators shall duly and faithfully account for, apply and pay all and every the sum and sums of money which hath come or shall come to his hands as surveyor of the turnpike road aforesaid, according to the direction and true intent and meaning of the said act, and of the statute made in the third year of the reign of his majesty King *George* the Fourth, "For regulating Turnpike Roads," then this bond to be void, or else to remain in full force.

[*The bond from the treasurer will be in the same form.*]

Surveyor's Assistant. Appointment of.

General highway act. No. VIII. See p. 145.

Appointment of an Assistant to the Surveyor.

Middlesex. *At a special sessions, held at in the hundred of by justices of the peace for the said county, acting within the said hundred, on the day of* 18 .

We do hereby nominate and appoint *C. D.*, a substantial inhabitant of the (*parish, etc.*) of in the said hundred, assistant to *A. B.* whom we have appointed surveyor of the highways for the said (*parish, etc.*); and you the said *C. D.* are, to the best of your skill and judgment, to assist the said surveyor, whenever requested by him, in calling in and attending the performance of the statute-duty, in collecting the compositions, fines, penalties, and forfeitures, and in making and collecting the assessments, and in making out and serving the notices authorized by the Act, passed in the thirteenth year of the reign of his majesty King *George* the Third, "For the Amendment and Preservation of the Highways," and in such other matters and things as shall be reasonably required of you by the said surveyor, in the execution of the office of surveyor, pursuant to the said Act; and you are justly and truly to account with, and pay to the said surveyor, or to his order, the money which shall come to your hands by the means aforesaid.

Given under our hands and seals, the day and year above mentioned.

Surveyor's Accounts. General highway act. No. IX. See p. 149.

Oath to be administered to the Surveyor upon passing his Accounts.

I, *A. B.* do swear, that the accounts now produced and delivered by me, as surveyor of the highways for the (*parish, etc.*) of for the last year, are just and true, to the best of my knowledge.

So help me GOD.

General highway act. No. X. See p. 149.

Allowance of the Accounts.

October, 18 .

These accounts were examined and allowed before

Surveyors. Nuisances and Obstructions.

General highway act. No. XI. See pp. 38, 39. 82.

Notice from the Surveyor to remove Nuisances and Obstructions, and to cut Hedges, &c.

To C. D. of

In pursuance of the directions given by the act, passed in the thirteenth year of the reign of his majesty King *George* the Third, "For the Amendment and Preservation of the Highways," I, *A. B.*, surveyor of the highways for the (*parish, etc.*) of

To remove nuisances and obstructions.

do hereby give you notice, forthwith to remove the (*dung, timber, stone, etc.*) placed by you in a certain part of the King's highway, lying between and in the (*parish, etc.*) of to the obstruction and annoyance of the said highway: *or* (forthwith to cut, prune, and plash the hedges, and

To cut and prune hedges or to cut or prune trees, and to open and scour ditches and water-courses.

cut or prune the trees, and to open, cleanse, and scour the several ditches and watercourses belonging to you) in or near the highway, lying between and in the (*parish, etc.*) of in or near the highway, lying between and , to the intent that the water may be drained from the said highway, and that the sun and wind may not be excluded from such highway, to the prejudice thereof.

Dated this day of 18 .

A. B.

General highway act. No. XII. See p. 38.

Allowance of Charges and Expences paid by Surveyors, which are to be repaid by the Possessor of the Lands, &c. and Order of the Justice for that Purpose.

Middlesex.

Whereas complaint hath been made unto me, *A. B.*, Esq., one of his majesty's justices of peace of the said county, by the oath of surveyor of the highways for the parish of in the said county, that *C. D.* of having had due notice to cut and prune his hedges, and cleanse and scour his ditches and watercourses, within or adjoining to the public highway between and in the said parish of hath neglected to do the same within the time required by such notice, and that the said hath caused the same respectively to be cut, pruned, cleansed, and scoured, pursuant to the directions of the act, passed in the thirteenth year of the reign of his majesty King *George* the Third, "For the Amendment and Preservation of the Highways," and hath expended therein the sum of as appears by an account now produced to me, which I think a reasonable charge, and do therefore allow the same, and hereby order the said *C. D.* to pay the said sum of to the said within six days from the time of his being served with this order.

Given under my hand and seal, this day of 18 .

Tenure. See *Repair.*

Toll-Gate. See *Warrant.*

Tolls. General turnpike act, 3 G. 4. c. 126. No. VI. See p. 155.

Notice for letting Tolls.

Notice is hereby given, That the tolls arising at the toll-gate [*or* toll-gates, *if more than one*], upon the turnpike road at called or known by the name of the gate, will be let by auction to the best bidder, at the house of at on the day of next, between the hours of and in the manner directed by the act passed in the third year of the reign of his Majesty King George the Fourth, "For regulating Turnpike Roads," which tolls produced the last year the sum of above the expences of collecting them, and will be put up at that sum: whoever happens to be the best bidder, must at the same time pay one month in advance (if required) of the rent at which such tolls may be let, and give security, with sufficient sureties, to the satisfaction of the

trustees of the said turnpike road, for payment of the rest of the money monthly [*or in such other proportions as shall be directed.*]

A. B. clerk of the trustees of the said turnpike road.

General turnpike act, 3 G. 4. c. 126. No. VII. See p. 161.

Order of Trustees for reducing the Tolls.

At a Meeting of the Trustees of the Turnpike Roads, under an Act passed in the year of the reign of King George the "For, &c" [*state the principal part of the title of the act*], held at the day of

We, whose names are subscribed, being or more of the trustees acting under the said act, being now assembled for reducing the tolls authorized to be taken by and under the said act, pursuant to public notice given for that purpose in the newspapers circulated in this part of the country, and also affixed upon all the turnpike-gates erected upon the said turnpike-road, for upwards of one calendar month now last past, and having the consent of the several persons entitled to five-sixth parts of the money now remaining due upon the credit of the said tolls, this day signified and proved to us, do hereby order, that the tolls granted by the said act shall, from and after the day of be lessened and reduced in the following manner [*here state the several reductions proposed to be made.*]

Trust. See *General Statement.*

Trustee of Turnpike Roads. See *Conveyances, Oath, Side-Gate, Tolls.*

Turnpike Bill. See *Affidavit.*

Vestry. See *Statute-Duty.*

Warrant. Of Distress.

General highway act. No. XXXVI.

Warrant to Distrain for a Forfeiture.

Middlesex. *To the* (Constable) (Headborough) *or* (Tithingman) *of*

Whereas, *A. B.*, of , in the said county (*yeoman*), is this day convicted before me, *C. D.*, Esq., one of his majesty's justices of the peace in and for the said county, upon the oath of *G. H.*, a credible witness, for that the said *A. B.* hath [*here set forth the offence, describing it particularly in the words of the statute, as near as may be*], contrary to the statute in that case made and provided, by reason

whereof the said *A. B.* hath forfeited the sum of to be distributed as herein is mentioned, which he hath refused to pay: These are therefore, in his majesty's name, to command you to levy the said sum of by distress of the goods and chattels of him the said *A. B.*, and if within the space of four days next after such distress by you taken, the said sum, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay one-half of the said sum of to *E. F.*, of , who informed me of the said offence, and the other half of the said sum of to *J. K.*, the surveyor of the highways, for the (*parish*, *township*, or *place*) where the said offence (*neglect*) or (*default*) happened, to be employed towards the repair of the said highways, returning the overplus, upon demand, to him the said *A. B.* (the reasonable charges of taking, keeping, and selling the said distress being first deducted); and if sufficient distress cannot be found of the goods and chattels of the said *A. B.* whereon to levy the said sum of , that then you certify the same to me together with this warrant.

To be varied according to the act, in each particular case.

Given under my hand and seal, the day of 18 .

C. D.

General highway act. No. XXXVII.

Return of the Constable to be made upon the Warrant of Distress, when there are no Effects.

I, *A. B.*, constable of the (*parish, etc.*) of in the (*county*) of do hereby certify and make oath, that, by virtue of this warrant, I have made diligent search for the goods of the within named , and that I can find no sufficient goods whereon to levy the within sum of . As witness my hand, the day of 18 .

A. B.

Sworn before me the day and year, *etc.* *C. D.*

General highway act. No. XXXVIII.

Warrant of Distress for Non-payment of Money charged by an Assessment.

Middlesex. *To the* (Constable) (Headborough) *or* (Tithingman) *of in the said* (county).

Whereas, by an assessment made upon the occupiers of lands, tenements, woods, tithes, and hereditaments, within the (*parish, etc.*) of in the said (*county*), for the purposes of, &c. [*as stated in the justices' order*], pursuant to an order of justices for that purpose, according to the directions of the act, passed in the thirteenth year of the reign of his majesty King *George* the Third, "For the Amendment and Preservation of the Highways," *A. B.* was charged the sum of as his share and proportion of the said

assessment, in respect of the lands, tenements, woods, tithes, and hereditaments which he occupied within the said (*parish, etc.*): And whereas it appears to me, upon the oath of that the said sum of hath been duly demanded from the said *A. B.*, and that he hath refused to pay the same for the space of ten days after such demand made, these are therefore, in his majesty's name, to command you to levy the said sum of by distress of the goods and chattels of the said *A. B.*, and if the same shall not be paid within the space of four days next after such distress by you taken, together with the reasonable charges of taking and keeping the same, that you do then sell the said goods and chattels so by you distrained; and out of the money arising by such sale, that you do pay unto *C. D.*, the surveyor of the highways for the said (*parish, etc.*) of the said sum of , to be employed for the purposes aforesaid; and that you do return the surplus thereof to the said *A. B.* (the reasonable charges of taking, keeping, and selling the said distress, being first deducted); and if sufficient distress cannot be found of the goods and chattels of the said *A. B.* whereon to levy the said sum of that then you certify the same to me, together with this warrant.

Given under my hand and seal, the day of 18 .

General highway act. No. XXXIX.

Commitment for want of Distress.

Middlesex. *To the* (Constable) *of in the said County, and to the Keeper of the Common Gaol* (or *the House of Correction*) *at in the said County.*

Whereas, *A. B.*, of in the said county (*yeoman*), was, on the day of convicted before me, *C. D.*, Esq., one of his Majesty's justices of the peace in and for the said county, upon the oath of *E. F.*, a credible witness, for that he, the said *A. B.* [*here set forth the offence*], contrary to the statute made in the thirteenth year of the reign of his majesty King *George* the Third, "For the Amendment and Preservation of the Highways," by reason whereof the said *A. B.* hath forfeited the sum of : And whereas, on the day of in the year aforesaid, I did issue my warrant to the (constable) of to levy the said sum of by distress and sale of the goods and chattels of him the said *A. B.*, and to distribute the same according to the directions of the said statute: And whereas, it duly appears to me upon the oath of the said (constable), that the said (constable) hath used his best endeavours to levy the said sum on the goods and chattels of the said *A. B.* as aforesaid, but that no sufficient distress can be had whereon to levy the same, these are therefore to command you, the said (constable) of aforesaid, to apprehend the said *A. B.*, and him safely to convey to the common gaol (*or* house of correction) at in the said county, and there deliver him to the keeper thereof, together with this precept: and I do hereby also command you, the said keeper, to receive and keep in your custody the said *A. B.* for the space of three months, unless the

said sum shall be sooner paid, pursuant to the said conviction and warrant; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, the day of in the year of our Lord 18 .

C. D.

In the case of a commitment for the want of payment of money due by an assessment, it must be (to receive, and keep in your custody, until he shall have paid the said sum of and the further sum of being the costs and charges occasioned by his neglect in paying the same).

General turnpike act, 3 G. 4. c. 126. No. XX.

Warrant to Distrain for Forfeiture.

To the (Constable, Headborough *or* Tithingman) *of* County of to wit.

Whereas, *A. B.*, of , in the said county, is this day convicted before me, *C. D.*, Esq., one of his majesty's justices of the peace in and for the said county, upon oath of *G. H.*, a credible witness, for that the said *A. B.* hath [*here set forth the offence, describing it particularly in the words of the statute, as near as may be*] contrary to the statute in that case made and provided, by reason whereof the said *A. B.* hath forfeited the sum of to be distributed as herein is mentioned, which he hath refused to pay: these are therefore, in his majesty's name, to command you to levy the said sum of by distress of the goods and chattels of him the said *A. B.*; and if within the space of four days next after such distress by you taken, the said sum, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay one half of the said sum of to *E. F.* of who informed me of the said offence, and the other half of the said sum of to *I. K.* the surveyor of the turnpike road [*describing it*], where the said offence, neglect, or default happened, to be employed toward the repair of the said road, returning the overplus on demand, to him, the said *A. B.* (the reasonable charges of taking, keeping and selling the said distress being first deducted); and if sufficient distress cannot be found of the goods and chattels of the said *A. B.*, whereon to levy the said sum of , that then you certify the same to me, together with this warrant.

Given under my hand and seal, the day of .

C. D.

General turnpike act, 3 G. 4. c. 126. No. XXI.

Return of the Constable, to be made upon the Warrant of Distress, where there are no Effects.

I, *A. B.*, constable of the (*parish, etc.*) of in the county of , do hereby certify and make oath, that

by virtue of this warrant, I have made diligent search for the goods of the within named , and that I can find no sufficient goods whereon to levy the within sum of

As witness my hand, the day of .

A. B.

Sworn before me, the day and year, *etc.*

C. D.

General turnpike act, 3 G. 4. c. 126. No. XXII.

Commitment for Want of Distress.

To the (Constable) *of in the said county, and to the* (Keeper) *of the common gaol* (or *the house of correction*) *at , in the said county.*

County of to wit.

Whereas, *A. B.* of in the said county, was on the day of convicted before me, *C. D.*, Esq., one of his Majesty's justices of the peace in and for the said county, upon the oath of *E. F.* a credible witness, for that he the said *A. B.* [*here set forth the offence*], contrary to the statute made in the third year of the reign of his Majesty King George the Fourth, "For regulating Turnpike Roads," by reason whereof the said *A. B.* hath forfeited the sum of : And whereas, on the day of in the year aforesaid, I did issue my warrant to the (constable) of to levy the said sum of by distress and sale of the goods and chattels of him the said *A. B.*, and to distribute the same according to the directions of the said statute: And whereas it duly appears to me, upon the oath of the said (constable), that the said (constable) hath used his best endeavours to levy the said sum on the goods and chattels of the said *A. B.* as aforesaid; but that no sufficient distress can be had whereon to levy the same: these are therefore to command you, the said (constable) of aforesaid, to apprehend the said *A. B.*, and him safely to convey to the common gaol (*or* house of correction) at in the said county, and there deliver him to the keeper thereof together with this precept: And I do also command you the said keeper, to receive and keep in your custody the said *A. B.* for the space of three months, unless the said sum shall be sooner paid pursuant to the said conviction and warrant; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, the day of in the year of our Lord 18 .

C. D.

Burn's Justice, Vol. II. p. 761. See p. 147.

Warrant of Distress for not Scouring Ditches, &c.

to wit.

To the constable of the parish of in the county of

Forasmuch as *A. O.*, of the parish of , in the said county of , is convicted before me, *G. C.*, Esq., one of his ma-

jesty's justices of the peace in and for the said county; for that he the said *A. O.* (being the occupier of lands next adjoining to the common highway in the said parish of , and liable to cleanse, open, and scour the ditch and drain lying between the said common highway and the lands so occupied by him, the said *A. O.* as aforesaid, in order to drain and keep dry the said common highway next unto such ditch, as often as occasion should be, and having had due and legal notice from the surveyors of the said parish to open, cleanse, and scour the said ditch or drain so adjoining to the said highway as aforesaid) hath for the space of ten days after such notice, neglected, refused, and made default in opening, cleansing, and scouring the said ditch or drain adjoining to the said highway in the said parish of , whereby he hath forfeited the sum of ten shillings.

These are, therefore, in his said majesty's name, to command you to levy the said sum of ten shillings, by distress of the goods of him, the said *A. O.*, and if within the space of five days next after such distress, by you taken, the said sum of ten shillings, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained; and out of the money arising by such sale, that you do pay the said sum of ten shillings to him the said surveyor, to be employed in such manner as the statute in that case directs, returning to him, the said *A. O.*, the overplus upon demand.

Given under my hand and seal this day of in the year of our Lord .

G. C.

Warrant.

General turnpike act, 3 G. 4. c. 126. No. XV. See p. 180.

Warrant from a Justice of the Peace to enter the Toll-Gate House, and remove the Persons therein.

To the (Constable, Headborough, *or* Tithingman), *of* ,
in the said County.

County of to wit.

Whereas complaint hath been made unto me, *A. B.*, Esq., one of his majesty's justices of the peace for the said county, upon the oath of and other evidence now produced to me, that *C, D.*, who now inhabits the turnpike or toll-gate house at , upon the turnpike-road leading from to , and was appointed to collect the tolls there, hath been duly discharged by the trustees of the said turnpike road, from any further collecting or receiving the tolls arising at the said gate, and hath refused and still doth refuse to quit the possession of the said house, and the said *C. D.* having been summoned to appear before me this day, to shew cause why he should not be removed from the said house, and having shewn no sufficient cause for that purpose [*or* not having appeared], I do hereby authorize and require you, with such assistance as shall be necessary, to enter into the said toll-house or turnpike-house, and the buildings belonging thereto, in the day time, and to remove the said *C. D.*, and all such persons as shall be found therein, together with his

and their goods, out of such house and buildings, and to put *E. F.*, the person lately appointed by the trustees to collect such tolls, into the possession thereof, for which this shall be your sufficient warrant.

Given under my hand and seal this day of

[*This form may be varied to suit the case of the widow or family of a deceased collector.*]

Burn's Justice, Vol. II. p. 762. See p. 27.

X. Warrant to apprehend the Driver of a Waggon, Cart, &c. for Misbehaviour.

County of to wit. *To all constables, and other his majesty's officers of the peace for the said county.*

These are, in his majesty's name, to command you, and every of you, upon sight hereof, to take and bring before me, or some other of his majesty's justices of the peace for the said county, the body of *A. D.*, the driver of a certain belonging to , of , in the said county , to answer to all such matters and things, as on his majesty's behalf, are on oath objected against him by , for riding upon a certain carriage called a , in a public highway in the said county, he the said *A. D.* not having some other person on foot or on horseback to guide the same, and which said carriage was not then conducted by some person holding the reins thereof. Hereof fail not at your peril.

Given under my hand and seal, this day of , and in the year of our Lord .

Weighing Engine.

General turnpike act, 3 Geo. 4. c. 126. No. I. See p. 142.

Order of Trustees for Erecting a Weighing Engine.

At a Meeting of the Trustees of the Turnpike Roads, under an act passed in the year of the reign of his Majesty King *George* the , "For" [*state the title of the act*] held at the day of

In pursuance of the powers given to us by an act passed in the third year of the reign of his majesty King *George* the Fourth, for regulating turnpike roads, we do hereby order that an engine proper for the weighing of carriages of the constructions and weights specified in the said act, be forthwith erected at, or as near as conveniently may be to the toll-gate or bar now erected upon the said turnpike road at ; and that *A. B.* the [treasurer, clerk *or*] surveyor of the said turnpike road, do contract with some proper person [*or*, with *C. D.*] [*in case the trustees shall think fit to name the person*], for the making and erecting such engine, and do inspect and take care that the same is properly done; and we do order the gatekeeper at the said gate or bar for the time being to attend the said weighing engine, and carefully to weigh all carriages passing loaded upon the said road, at the place where such engine shall be erected, together with the loading thereof, and to take the several additional tolls or rates for

overweight, and give tickets of the weight of such carriages and loading, when required by the driver thereof, and also to enter in a separate book to be kept by him for that purpose, an account of every carriage so weighed, which shall with the loading exceed the weights allowed by the said act, and account to us for the money received for all such overweight.

General turnpike act, 3 G. 4. c. 126. No. III. See p. 142.

Agreement between Trustees of different Turnpike Roads for Erecting One Weighing Engine for the Use of such Roads.

At a Meeting of the Trustees of the Turnpike Roads, under an act passed in the year of the reign of King *George* the "For" [*state the principal part of the title of the act*] and also of the Trustees of the Turnpike Roads, under an act passed in the year of the reign of King George the "For" [&c. *as above*], held at the day of for the purpose of agreeing upon and ordering a Weighing Engine at the joint expence of the Trustees, for the use of the said several Turnpike Roads, pursuant to the powers given by an act passed in the third year of the reign of his majesty King *George* the Fourth, "For regulating Turnpike Roads:"

It appearing to us, that a weighing engine may be erected at [*describing the spot where it can be most conveniently placed*], which will accommodate both the said turnpike roads, according to the true intent and meaning of the said act: we do therefore order, &c. [*as in the form above mentioned*], and we do hereby agree and order, that the expences of making and erecting the said weighing engine, and the sum of which we do hereby agree and order shall be paid to the toll gatherer attending the said toll-gate for the time being, weekly for his extraordinary trouble in attending the said weighing engine, shall be advanced and paid by the treasurers of the said several turnpike roads, in the shares and proportions following: viz. that the treasurer of the road shall pay [one half], [two third], [three fourth] parts thereof, [*as the trustees shall agree*], and the treasurer of the road shall pay the remaining [one half], [one third], *or* [one fourth] part thereof; and that the money to be received at the said weighing engine by forfeitures for overweight, shall be paid to the said respective treasurers in the like proportions, and applied by them for the use of the said respective turnpike roads.

(Signed)

Widening Highways. See *Highways.*

II. PRECEDENTS OF INDICTMENTS, PLEADINGS, ETC.

INDICTMENTS FOR THE NON-REPAIR OF HIGHWAYS, AND PLEAS THERETO.

Indictment against the Inhabitants of a Parish for not repairing a common Highway.

That on, &c., there was, and from thence hitherto hath been, and still is, a certain common King's highway, leading from *A.* in the county of *C.* towards and unto *D.* in the said county, for all the liege subjects of our said lord the King, with their horses, coaches, carts and carriages, to go, return, pass, repass, ride and labour, at their free will and pleasure; and that a certain part of the same King's common highway, situate, lying and being in the parish of *F.* in the county of *M.*, containing in length and in breadth , on, &c. was and from thence until the day of the taking of this inquisition, hath been and still is at the parish of *F.* in the county aforesaid, very ruinous, miry, deep, broken and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said lord the King through the same way, with their horses, coaches, carts and carriages, could not, during the time last aforesaid, nor yet can go, return, pass, repass, ride, and labour, without great danger of their lives and the loss of their goods, to the great damage and common nuisance of all the liege subjects of our said lord the King, through the same way going, returning, passing, repassing, riding, and labouring, and against the peace of our said lord the King, his crown and dignity, and that the inhabitants of the said parish of *F.* in the said county of *M.*, the common highway aforesaid, so as aforesaid being in decay, ought to repair and amend when and so often as it should or shall be necessary.

Plea by two of the Inhabitants of a Parish that they are not Guilty as to part of the Road in question, and as to the rest, that it ought to be repaired by particular individuals, by reason of the inclosure of certain Lands.

And *A. B.* and *C. D.* two of the inhabitants of the said parish of *M.* for themselves and the rest of the inhabitants of the said parish of *M.*, except *E. F.*, *G. H.*, and *I. K.* come, and having heard the said indictment read, say, that as to certain part of the said highway, in the said indictment specified, and therein mentioned to be ruinous and in decay, beginning at *A.* and extending from thence to *B.* in the said indictment mentioned, and therein alleged to be ruinous and in decay as

aforesaid, they are not guilty of the premises in the said indictment specified, above laid to their charge, as by the said indictment is above supposed, and of this they put themselves upon the country, &c.; and as to the residue of the same highway, they say, that they do not intend, that our said lord the King will further proceed against the said inhabitants of the said hamlet of *M.* or any of them, except the said *E. F.* and *G. H.* and *I. K.*, by reason of the premises in the said indictment specified; because they say, that the said residue of the said highway, in the said indictment mentioned, and therein alleged to be ruinous, miry, deep, broken, and in decay, adjoins, and from time whereof the memory of man is not to the contrary, hath adjoined to certain lands in the parish of *M.* aforesaid, now and at the time of the taking of the said inquisition, in the several occupations of the said *E. F.* and *G. H.* and *I. K.*; and that the said residue of the said highway, in the said indictment mentioned, and therein alleged to be ruinous, deep, miry, broken and in decay as aforesaid, from time whereof the memory of man is not to the contrary, until the inclosure thereof hereinafter mentioned, was a certain common King's highway, upon and leading over a certain piece of open and uninclosed ground, called , of which the said several lands, in the several occupations of the said *E. F.*, *G. H.* and *I. K.* were parcel, and not separated or divided from the same by any fence or inclosure. And that afterwards, to wit, on, &c. the same residue of the same highway was inclosed on both sides thereof by certain fences, then erected and made in and upon the said respective lands, now in the occupation of the said *E. F.* and *G. H.* and *I. K.*, and continually from that time hitherto hath continued, and still continues, so inclosed as aforesaid; and at the time of the taking the said indictment, and continually from thenceforth hitherto hath been, and still is continued so inclosed by the said *E. F. G. H.* and *I. K.* respectively, by and with the respective fences of their said respective lands. And that the said *E. F. G. H.* and *I. K.* respectively, by reason of their said continuance of the said inclosure of the said residue of the said highway, so being ruinous and in decay as aforesaid, ought to have repaired and amended, and still ought to repair and amend, the said residue of the same highway, so long as they have continued and shall continue the said inclosure, in manner following: that is to say, the said *E. F.* ought to repair and amend so much of the said residue of the said highway throughout the whole breadth thereof, as hath been so continued inclosed by him, on both sides thereof as aforesaid; and so much thereof as hath been so continued inclosed by him on one side thereof only, the said *E. F.* ought to repair the same highway, on that side thereof, as far as the middle of the same highway; and the said *G. H.* and *I. K.* respectively ought, in like manner, to repair the respective parts of the said residue of the said highway adjoining to the said respective inclosures, so continued by them respectively as aforesaid, throughout the whole breadth thereof; where the same is so inclosed by them respectively on both sides thereof, and where the same is so inclosed by either of them on one side thereof only, then the said *G. H.* and *I. K.* respectively ought to repair the same respective parts, so inclosed by either of them on one side, on such respective side only as far as the middle of the same highway, so long as their said respective inclosures shall be continued by them respectively as aforesaid; and this the abovementioned *A. B.* and *C. D.* for themselves and the rest of the inhabitants of the said

parish of *M.* (except as aforesaid) are ready to verify; wherefore they pray judgement of the court here, and that they may be dismissed and discharged of the premises in the said indictment above specified.

Plea, that the Parish consists of several Townships, each of which is bound by Custom to repair its own Roads.

And *A. B.* and *C. D.*, two of the inhabitants of the parish of *B.*, by *M. N.*, their attorney, for themselves and the rest of the inhabitants of the said parish, except the inhabitants of the townships of *C.* and *H.* hereinafter mentioned, come, and having heard the said indictment read, say, that they do not intend that our said lord the King ought further to proceed against the inhabitants of *B.* except as aforesaid, by reason of the premises in the said indictment specified, because they say that the said parish of *B.* now is, and at the time of the taking of the said inquisition was, and from time whereof the memory of man is not to the contrary, hitherto hath been divided into divers, to wit, seven districts and different townships, that is to say, one township there called *C.*, and one other township there called *H.*, and that within the said parish there now is, and at the time of the taking the said inquisition there was, and during all the time aforesaid there hath been, a certain ancient and laudable custom there during all the time aforesaid used and approved of: that is to say, that the inhabitants of each of the said several townships, from time whereof the memory of man is not to the contrary, have repaired, maintained, and amended, and have used and been accustomed to repair, maintain, and amend, and during all the time aforesaid of right ought to have repaired, maintained, and amended, and still of right ought to repair, maintain and amend, all and every the King's common highways lying and being within their own respective townships, that would be otherwise repairable by the inhabitants of the said parish of *B.* at large, when and as often as necessary; and that the inhabitants of the said parish at large have not, during all or any part of the time aforesaid, repaired, maintained, or amended, and have not been used or accustomed to repair, maintain, or amend, and of right ought not to repair, maintain, or amend the King's common highways within the said parish, or any of them or any part thereof. And the said defendants further say, that so much of the said common King's highway, in the said indictment mentioned, and therein alleged to be ruinous and in decay, as beginning at *M.* in the parish aforesaid, extends from thence eastwards, for the length of yards, now is, and during all the time aforesaid, hath been situate and lying within the said township called *C.*, and during all that time was and is one of the King's highways in that township, that, but for the said custom, would be repairable by the inhabitants of the said parish at large; and that the same part of the said highway, during all the time aforesaid, of right has been repairable, and during all that time ought to have been repaired, maintained, and amended, and still of right ought to be repaired, maintained, and amended, by virtue of the said custom, by the inhabitants of the said township called *C.*, when and as often as necessary, and not by the inhabitants of the said parish of *B.* at large; and that the residue of the said highway in the said indictment mentioned, and therein alleged to be ruinous and in decay, now is, and during all the time aforesaid has been, situate and lying within the township called *H.*, and during all that time was and is one of the

King's common highways in that township, that, but for the said custom, would be repairable by the inhabitants of the said parish at large, and that the same part of the said highway, during all the time aforesaid, of right hath been repairable, and during all that time ought to have been repaired, maintained, and amended, and still of right ought to be repaired, maintained and amended, by virtue of the said custom, by the inhabitants of the said township called *H.*, when, and as often as necessary, and not by the inhabitants of the said parish at large; and this the said *A. B.* and *C. D.* are ready to verify, wherefore they pray judgement, &c. (*as before.*)

See other Precedents of Pleas by the Parish. Starkie's Criminal Pleading, Vol. II. pp. 800. 806. 6 Went. 394. Archbold's Criminal Pleading, p. 418, &c.

Indictment against a particular Division of a Parish for not Repairing a Highway. Starkie, Vol. II. p. 696.

Plea by a Township to an Indictment for not Repairing a Highway, Confession as to Part, Not Guilty as to the Rest. Id. p. 806.

And *A. B.* and *C. D.*, &c., say, that as to so much of the said highway in the said indictment mentioned, and therein supposed to be ruinous, miry, deep, broken and in decay, as lies betwixt the said place in the said indictment mentioned, called *B. G.* and a certain place at the township of *C.* aforesaid, called *S. H.*, containing in length yards, they cannot deny that they are guilty of the premises in that behalf above laid to their charge, in manner and form as by the said indictment is above supposed and alleged; and as to the rest of the premises, by the said indictment above laid to their charge, they say for themselves and the rest of the inhabitants of the township of *L.* aforesaid, that they are not guilty thereof in manner and form as in and by the said indictment is above supposed, and of this they put themselves upon the country, &c.

General Issue. Archb. p. 424.

And *J. S.* and *J. N.*, two of the inhabitants of the said district or township called *C.*, in the said parish of *F. B.*, by *A. B.*, their attorney, for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read, say, that they are not guilty of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, &c.

Indictment against an Individual for not Repairing a Road, to the Repair of which he was bound, *ratione tenuræ.*

[The same form as in the indictment against a parish, only at the end, instead of charging the inhabitants with the repair, say, "And

that *A. B.* late of, &c., esq. ought, by reason of his tenure of certain lands, situate, lying, and being at, &c. in the county aforesaid, to repair and amend the said highway, when and so often as it shall be necessary"].

See Starkie ut suprà, p. 695, and see other precedents of indictments for non-repair, Id. pp. 698. 782. 4 Wentw. 157, &c. 6 Wentw. Index, tit. viii.

General Issue. Archb. p. 423.

And the said *A. C.*, by *A. B.*, his attorney, comes into court here, and having heard the said indictment read, says that he is not guilty of the said premises in the said indictment above specified and charged upon him; and of this he puts himself upon the country, &c.

Replication, denying the liability *ratione tenuræ.*

And *M. N.*, esq., coroner and attorney of our said sovereign lord the King, in the court of our said lord the King, before the King himself, who prosecuteth for our said lord the King in this behalf, for our sovereign lord the King saith, that by any thing in the said plea above alleged, our said lord the King ought not to be barred from prosecuting the said indictment against the said inhabitants of the said parish of *L.* in the said county of *M.*, because, protesting that he doth not acknowledge any thing in the said plea to be true for plea in this behalf, for our said lord the King saith, that the said *E. F.*, by reason of his tenure of the said lands and tenements in the said plea mentioned, ought not to repair the said part of the said highway by the said indictment supposed to be out of repair, as in the said plea is above alleged; and this the said coroner and attorney of our said lord the King, for our said lord the King prayeth may be inquired of by the country; and the said *A. B.* and *C. D.*, two of the inhabitants of the said parish of , for themselves and the rest of the inhabitants of the said parish do the like.

See other Precedents of Pleas, &c. in case of Non-Repair, Starkie, ut suprà, pp. 805, 806. 814. 4 Wentw. 161. 6 Wentw. Index, tit. viii.

Indictments—Obstructions. Stark. p. 690.

Indictment for Digging a Hole in a Street, being the King's Highway.

to wit.

The jurors for our lord the King upon their oath present that *A. O.* late of on &c., at &c. in a certain street, being the King's common highway there, called , (used for all the King's subjects with their horses, coaches, carts, and carriages, to go, return, ride, pass, repass, and labour at their free will and pleasure), unlawfully and injuriously did dig, and cause to be dug, a certain pit, containing in circumference fifteen feet, and in depth thirteen feet; and the same pit, so as aforesaid dug, and caused to be dug, in the street and highway aforesaid, from the

day and year aforesaid, until , at, &c., unlawfully and injuriously did continue. By reason whereof, the King's subjects, during the time aforesaid, could not go, return, pass, repass, ride, and labour with their horses, coaches, carts, and carriages, in, by, and through the same street and highway as they were wont and ought to do, without great peril and danger of their lives, to the great damage and common nuisance of all the liege subjects of our said lord the King, in, by, and through the same street and highway, going, returning, passing, repassing, riding, and labouring, and against the peace, &c.

See other indictments of a similar kind, Starkie, p. 691. Archbold, p. 413. Burn's Justice, Vol. II. p. 770.

Indictment for Encroaching upon a Highway, by Building thereupon. Burn's Justice, Vol. II. p. 769.

to wit.

The jurors for our lord the King upon their oath present, That *A. O.* late of , carpenter, on the day of in the year with force and arms, at in and upon a common highway, in a certain place commonly called there, leading from to by a certain building there, containing in length feet, and in breadth feet, by him the said *A. O.* erected and built, hath unlawfully and unjustly encroached, and doth yet encroach, and the building aforesaid, so as is aforesaid erected and built by him the said *A. O.* from the aforesaid day of in the year aforesaid unto the day of exhibiting this information, at aforesaid, in the county aforesaid, with force and arms unlawfully and unjustly hath continued, and doth continue, by reason whereof the common highway aforesaid hath become and is greatly straitened, so that the liege subjects of the said lord the King upon and through the same common highway aforesaid, with their horses, carts, and carriages cannot go, pass, ride, and labour as they ought and were wont to do, to the great and common nuisance of all the liege subjects of the said lord the King in and through the said common highway going, passing, riding, and labouring, and against the peace of the said lord the King.

Indictment for Inclosing the Highway. Ibid.

to wit.

The jurors for our said lord the King upon their oath present, That whereas from the time whereof the memory of man is not to the contrary, the liege subjects of our said lord the King had and lawfully used a certain common highway at in the said county, in a certain place there called , leading from the town of aforesaid, to the town of , for themselves and their goods without any stoppage or hindrance by any ditches, hedges, or other obstacles whatsoever; nevertheless, one *A. O.* of aforesaid, in the county of aforesaid, yeoman, on the day of in the year of the reign of ,

with force and arms, at aforesaid, in the county of aforesaid, in the place aforesaid, called upon the common highway aforesaid, a certain ditch and quickset hedge did make, and the said ditch and quickset hedge so as aforesaid made, doth yet continue and keep, to the great stoppage and hindrance of the liege subjects of our said lord the King passing in and through the said common highway, and against the peace of our said lord the King.

Indictments, Pleas, &c.—Non-repair of Bridges. Stark. Vol. II. p. 701.

For not Repairing a Public Bridge.

That a certain common bridge, commonly called , lying and being in the parish of *B.* in the county of *E.*, in the common King's highway, there leading from *B.* aforesaid, in the county aforesaid, to the town of *R.* in the same county, being a common highway for all the liege subjects of our said lord the King, and his predecessors, with horses, carts, and carriages, to pass and repass, ride and labour, at their free will and pleasure, on, &c. was and still is in great decay, broken and ruinous, so that the liege subjects of our said lord the King, in, upon, and over the said bridge, with horses, carts, and carriages, could not and cannot pass and repass, ride and labour as they ought and were accustomed to do, to the great damage and common nuisance, &c. and against the peace, &c. [*If the prosecution be against an individual ratione tenuræ, then allege,*] and that *A. B.* late of, &c., by reason of his tenure of certain lands, lying in the parish of *B.* in the said county, is bound to repair and amend the said common bridge as often and whenever it shall be necessary. [*If against a county allege,*] and that the inhabitants of the county aforesaid are bound to repair and amend the said common bridge, when and so often as it shall be necessary.

For other such precedents, see Archbold, p. 424.

Plea by an Individual to an Indictment for not Repairing an Highway or Bridge. Stark. p. 808.

And the said *A. B.*, by *C. D.*, his attorney, comes, and having heard the said indictment read to him, says, that he is *not guilty* of the premises in the said indictment specified, above laid to his charge, and of this, he the said *A. B.* puts himself upon the country.

Demurrer to an Indictment against a County for the Non-repair of a Public Bridge. Starkie, p. 809.

Precedents of Declarations, Pleas, &c. respecting Rights of Way.

Indebitatus Assumpsit for Tolls on Loaded Carriages passing over a Bridge. Chitty's Pleadings, Vol. II. p. 47.

Indebitatus Assumpsit for the Use of a Way. Chitty's Pleadings, Vol. II. p. 39.

Case for Disturbance of a Way. Chitty, Vol. II. p. 405.

For that whereas, the said *A. B.* before and at the time of the committing of the grievance hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully *possessed* of a certain messuage and garden thereto belonging, with the appurtenances, situate, lying, and being at, &c. And *by reason thereof*, the said *A. B.*, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from and out of the said garden, unto, into, through, and over a certain close, in the parish aforesaid, and from and out of the same, unto and into a certain wharf, or quay, of the said *A. B.* in the parish aforesaid, and so back again from the said wharf, or quay, unto and into, through, over, and along the said close, and from and out of the same unto and into the said garden of the said *A. B.* for himself and his servants, on foot, to go, return, pass, and repass every year, and at all times of the year, at his and their free will and pleasure, as to the said messuage and garden, with the appurtenances of the said *A. B.* belonging and appertaining. Yet the said *C. D.*, well knowing the premises, but wrongfully and unjustly contriving, and intending to injure the said *A. B.* in that behalf, and to deprive him of the use and benefit of his said way, whilst he, the said *A. B.*, was so possessed of his said messuage and garden, with the appurtenances as aforesaid, to wit, on, &c., and on divers other days and times between that day and the day of exhibiting this bill, at, &c. aforesaid, wrongfully and injuriously placed and erected, and caused and procured to be placed and erected, divers large quantities of boards, planks, and wood, in and across the said way, and put and placed, and caused and procured to be put and placed, divers other large quantities of wood and timber in the said way, and kept and continued the said boards, planks, and wood, so placed and erected in and across the said way as aforesaid, and also the said other wood and timber in the same way as aforesaid, for a long space of time, to wit, hitherto, and thereby during all the time aforesaid, the said way was and still is greatly obstructed and stopped up; and the said *A. B.* by means thereof could not, during the time aforesaid, or any part thereof, nor can he now have or enjoy his said way, as he of right ought to have done, and otherwise might and would have done, and hath been, and is by means of the premises deprived of the use, benefit, and advantage thereof, to wit, at, &c. aforesaid.

And whereas also, the said *A. B.* before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage, with the appurtenances, situate at, &c., and by reason

Second count, p. 407.

thereof the said *A. B.* during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from the said messuage of the said *A. B.* unto, into, through, and over a certain close in the parish aforesaid, unto and into a certain common and public highway in the county aforesaid, and so back again from the same common and public highway, unto, into, through, and over the said close, and from thence into the said messuage of the said *A. B.* for himself and his servants to go, return, pass, and repass, on foot, every year, at all times of the year, at his and their free will and pleasure, as to his said last-mentioned messuage, with the appurtenances belonging and appertaining. Yet the said *C. D.*, well knowing the said last-mentioned premises, but wrongfully and unjustly intending to injure the said *A. B.* in that behalf, and to deprive him of the use and benefit of his said last-mentioned way, whilst he the said *A. B.* was so possessed of the said last-mentioned messuage, with the appurtenances, and so entitled to the said way as aforesaid, to wit, on, &c. as aforesaid; and on divers other days and times between, &c. at, &c. aforesaid, wrongfully and injuriously stopped up and obstructed the said last-mentioned way, and the said *A. B.* by means thereof could not, during the time aforesaid, nor can he have or enjoy his said last-mentioned way, as he of right ought to have done, and otherwise might and would have done, and hath been, and is deprived of the use, benefit, and advantage thereof, to wit, at, &c. aforesaid.

See other precedents, 8 Wentw. Index, lv. (5). 9 Wentw. Index, xv. 3 Ld. Raym. 85.

Disturbance of a Ferry. Chit. Vol. III. p. 447.

For that whereas the said plaintiffs, before and at the time of the committing of the grievances hereinafter in this count mentioned, were, and from thence hitherto have been, and still are, entitled as trustees for the society of free waterman of the river Thames, residing at Greenwich, in the county of Kent, called the Isle of Dogs Ferry Society, to the fee-simple and inheritance of an ancient ferry, called Potter's Ferry, for foot passengers and goods belonging to such foot passengers, across the river Thames, to and from a certain place in the Isle of Dogs, in the parish of St. Dunstan Stebonheath, otherwise Stepney, in the county of Middlesex, from and to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers and their goods, over and across such ferry, in any boat or boats kept by, or by the authority of them the said plaintiffs for that purpose, certain reasonable freights or ferryages, to wit, two-pence for every person on foot; nevertheless, the said defendant, not being one of the free watermen aforesaid, but well knowing the premises, and contriving to disturb and injure the said plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, to wit, on the day of , in the year of our Lord , and on divers other days between that day and the day of exhibiting this bill, to wit, at Westminster, in the county of Middlesex, injuriously and unlawfully, and against the will of the said plaintiffs, carried and conveyed in a certain boat of him the said defendant, divers foot passengers for hire, over and across the said river Thames, and upon the said part of the same river where the said plaintiffs had such ferry as afore-

said, and upon the said ferry of them the said plaintiffs, by reason whereof the said plaintiffs have lost and been deprived of divers profits and emoluments, which would otherwise have arisen and accrued to them from the enjoyment of their said ferry, and have been and are greatly prejudiced and disturbed in the possession thereof, and their right and title thereto, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid. And the said plaintiffs further say, that they the said plaintiffs so being entitled as trustees for the said society, to the fee-simple and inheritance of the said ferry as aforesaid, the said defendant not being one of the free watermen aforesaid, but well knowing the premises, and further contriving to disturb and injure the said plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, and whilst the said plaintiffs were so entitled, as trustees as aforesaid, to the fee-simple and inheritance of the said ferry, to wit, on the said day of , in the year of our Lord , and on divers other days and times between that day and the day of exhibiting this bill, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, injuriously and unlawfully, and against the will of the said plaintiffs, carried and conveyed in a certain boat of him the said defendant, divers foot passengers for hire, over and across the said river Thames, near to the said part of the same river, where the said plaintiffs had such ferry as aforesaid, and near to the said ferry of them the said plaintiffs; by reason whereof the said plaintiffs have lost and been deprived of divers other profits and emoluments which would otherwise have arisen and accrued to them from the enjoyment of their said ferry, and have been and are greatly prejudiced and disturbed in the possession thereof, and their right and title thereto, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid. And also for that whereas the said plaintiffs, before and at the time of committing the grievances in this count mentioned, were and still are lawfully possessed of a certain ancient ferry, with the appurtenances, upon and over the river Thames, to and from a certain place in the Isle of Dogs, in the parish of St. Dunstan Stebonheath, otherwise Stepney, in the said county of Middlesex, from and to Greenwich aforesaid, in the county of Kent aforesaid, for carrying and conveying, within the said last-mentioned ferry, all persons and their goods, having occasion for the same, in boats kept by and by the authority of them the said plaintiffs there for that purpose, taking for the same certain reasonable freights and ferryages, to wit, two-pence for each person; yet the said defendant, well knowing the premises last aforesaid, but contriving to disturb and injure the said plaintiffs in the peaceable enjoyment of their said last-mentioned ferry, heretofore, to wit, on the said day of , in the year of our Lord , and on divers other times between that day and the day of exhibiting this bill, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, unlawfully, injuriously, and wrongfully, carried and conveyed divers passengers, for hire, in a certain boat, over and across the said river, and upon the said part of the said river where the said plaintiffs had such ferry as last aforesaid, and over, upon, within, and across the said last-mentioned ferry of the said plaintiffs, and thereby they the said plaintiffs lost divers great gains and profits, which would otherwise have accrued to them from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof, and in their right and title

thereto, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid. And the said plaintiffs further say, that they the said plaintiffs, so being possessed of the said last-mentioned ferry, with the appurtenances as aforesaid, the said defendant, well knowing the premises last aforesaid, but further contriving and intending as last aforesaid, heretofore, and whilst the said plaintiffs were so possessed of their said last-mentioned ferry, with the appurtenances as aforesaid, to wit, on the said day of , in the year of our Lord , and on divers other days and times between that day and the day of exhibiting this bill, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, unlawfully, injuriously, and wrongfully, carried and conveyed divers passengers, for hire, in a certain boat of him the said defendant, over and across the said river, and near to the said part of the said river where the said plaintiffs had such ferry as last aforesaid, and near to the said last-mentioned ferry of the said plaintiffs, and thereby they the said plaintiffs lost divers other great gains and profits which would otherwise have accrued to them from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof, and in their right and title thereto, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, to the damage, &c.

See 6 B. & C., p. 703.

Trespass.—Pleas in.

Plea of Public Right of Way.

Right of Way. 9 Wentw. p. 233.

Plea (for entering close, consuming grass, and breaking down gate) that there is a common highway over locus to pass through with horses and carts, and because the way was obstructed by the gates, defendant pulled them down.

First, General Issue: And for further plea in this behalf as to all the trespasses in the said declaration mentioned, and above supposed to have been done by the said defendant, except the coming with force and arms, and whatsoever is against the peace of his present Majesty, the said defendant, by leave, &c., says, (*actio non*); because he says, that the said close in which, &c. in the first count of the said declaration mentioned, and the said close in which, &c., in the second count of the said declaration mentioned, are one and the same close, and not divers or different closes, and that the said several supposed trespasses in the first and second counts of the said declaration mentioned, except the coming with force and arms, and whatever is against the peace of his present Majesty, are the very same identical trespasses, and not divers or different trespasses, and that in, through, and over the said close in which, &c., at the said several times when, &c., and long before, there was, and yet is a certain common public highway leading from the village of Little Hampton, in the said county, to, through, and over the said close in which, &c., to the village of Washington in the said county, for all the liege subjects of our said lord the King to go, return, pass, and repass, as well on foot as on horseback, and with their cattle, carts, waggons, and other carriages, in and along the said public highway there from the said village of *L.* in the said county, in, through, and over the said close in which, &c., to the said village of *W.*, as it was lawful for him to do for the cause aforesaid, and in so doing the said defendant, at the said several times when, &c., with his feet in walking, and with the feet of the said cattle necessarily

and unavoidably trod down, trampled upon, spoiled, and consumed a little of the grass then growing in the said close in which, &c., in the said highway there, and the said cattle at the said several times when, &c., in passing and repassing along the said highway through the said close of the said Sir *H. G.*, in which, &c. as aforesaid, against the will of the said defendant, snatched, ate up, and depastured a little of the grass there then growing, doing as little damage to the said close in which, &c., as might be on the occasion aforesaid, and with the said carts, waggons, and other carriages, crushed, squeezed, and spoiled a little other of the grass of the said Sir *H.* in the said highway there, and ploughed up, turned up, and spoiled a little of the soil in the said highway there, doing as little damage as might be on the occasion aforesaid; and because at the said several times when, &c., the said hedges, fences, and gates were wrongfully erected, standing, and being in the said close in which, &c., across the said way there, and the said close in which, &c., across the said way there, and the said gates, at the said time when, &c., were wrongfully locked, fastened, and chained with the said locks, bars, iron bolts, and chains, and obstructed the said way there, so that the said defendant could not pass with the said cattle, carts, waggons, and carriages along the said highway there, he, the said defendant, for having a necessary passage along and over the said highway at the said several times when, &c., did a little pull down, tear down, break to pieces, and destroy the said hedges, fences, and gates, and the said locks, iron bars, bolts, and chains wherewith the said last-mentioned gates were then and there locked and fastened, broke off, and wrenched from the said last-mentioned gates and the materials thereof coming, laid down at the side of the highway in the said close in which, &c., and left the same in a convenient place there for the use of the said Sir *H.*, doing as little damage as the said defendant possibly could, which are the several supposed trespasses in the said declaration mentioned, whereof the said Sir *H.* hath above complained [except coming with force and arms, and whatever is against the peace of our present majesty]; and this, &c.; wherefore, &c.: And for further plea in this behalf as to all the trespasses in the said declaration mentioned, and above supposed to have been done by the said defendant (except, &c.) the said defendant, by leave, &c. (*actio non*); because he says, that the said closes in which, &c. in the said first and second counts of the said declaration mentioned, are one and the same close, and not other or different closes, and that the several and supposed trespasses in the said first and second counts of the said declaration mentioned, except as are in this plea above excepted, are the very same identical trespasses, and not other or different trespasses: And the said defendant further says, that William Frankland, Esq., long before the said first time when, &c., and at the said several times when, &c., was and yet is seised in his demense as of fee of and in a certain mansion-house, messuage, or tenement, and lands, with the appurtenances, called Manthouse, situate, lying, and being in the parish of Fendon, in the county aforesaid, and that the said William, and those whose estates he hath, and at the said several times when, &c., had of and in the said manor, house, and tenement, and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have and use for himself and themselves, and his and their farmers and te-

Third plea.

W. F. seised in fee of a messuage.

Prescription for right of way over locus in quo as well on foot as for horses and carriages.

nants, occupiers of the said mansion-house, messuage, or tenement, and lands, with the appurtenances for the time being, a certain way from the said messuage and mansion-house, lands and tenements, with the appurtenances, called *M.*, into, through, and over the said close called the Road, in which, &c., into a certain place called Washington, and so from thence back again into, through, and over the said road in which, &c., to the said mansion-house, &c., to go, return, pass, and repass on foot, and with his and their cattle, waggons, carts, and carriages every year, at all times of the year, at his and their free will and pleasure, as belonging to the said mansion-house, &c., and for enjoying, receiving, and taking the profits thereof, for which reason the said defendant, as the servant of the said William, and by his command at the said first time when, &c., and at the said several times when, &c., in the said declaration mentioned, having occasion to go that way, broke and entered the said close in the said declaration mentioned, and passed and repassed through and over the said close of the said Sir *H.* on foot, and with the said cattle, and with carts, waggons, and other carriages on and along the said way there from the said mansion-house, &c., called *M.* in, through, and over the said close in which, &c., in the said declaration mentioned in the said way into the said place called Washington, and from thence back again in the said way unto the said mansion-house, &c., called *M.*, using the said way for the purpose and on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid, and in so doing the said defendant, as the tenant of the said William, at the said several times, with his feet in walking, &c. &c.

THO. WALKER.

Replication, p. 235.

And the said Sir Harry, as to the said plea of the said defendant by him secondly above pleaded in bar as to the breaking, &c. says, that by reason of any thing in that plea alleged (*precludi non*); because he says that the said defendant, at the said several times when, &c. of his own wrong broke and entered the said closes in the said declaration mentioned, and with his feet in walking trod down, trampled upon, spoiled, and consumed the said grass there growing, and with the said cattle eat up, depastured, spoiled, and consumed the said other grass there growing, and with the said carts, waggons, and other carriages crushed, squeezed, and spoiled the said other grass of the said Sir H. there, and ploughed up, turned up, and spoiled the said grass of the said Sir H. there, and turned up, ploughed, and spoiled the said grass, and broke down, prostrated, and destroyed the said hedges, gates, and fences in the said declaration mentioned, and the said locks, bars, bolts, and chains wherewith the said were locked and fastened, broke off, and wrenched in manner and form as the said Sir H. hath above thereof complained against him; without this, that in, through, and over the said close in which, &c. at the said several times when, &c. and before then was and yet is a certain common public highway leading from the village of L. in the said county, into, through, and over the said close in which, &c. to the village of W. in the said county, for all the liege subjects of our said lord the king to go, return, pass, and repass as well on foot as on horseback, and with their cattle, carts, waggons, and other carriages in and along the said highway in the said close in which, &c., at all times, at their free will and pleasure, as the said defendant hath in his plea secondly above pleaded in bar alleged; and this, &c.; wherefore, &c.: And the said

Defendants, de injuria, &c.

Traverse of locus in quo being a common highway.

To 3d plea.

Sir H. as to the said plea of the said defendants by him lastly above pleaded in bar, as to the breaking, &c. (*preeludi non*); because he says, that the said defendant, at the said several times when, &c. of his own wrong broke, &c. &c. in manner and form as the said Sir *H.* hath above thereof complained against them; without this, that the said *William Frankland*, and all those whose estates he hath, and at the said several times when, &c. had of and in the said mansion-house, &c. from time whereof, &c. have had and used, and been accustomed to have and use, and still of right ought to have and use for himself and themselves, and his and their farmers and servants, occupiers of the said mansion-house, &c. called *M.* into, through, and over the said close called the road, in which, &c. into a certain place called *W.* and so from thence back again in, through, and over the said close called the Road in which, &c. unto the said mansion-house, &c. called *M.* to go, pass, and repass on foot, and with his and their cattle, waggons, carts, and carriages every year at all times of the year at their will and pleasure, as belonging and appertaining to the said mansion-house, &c. and for enjoying, receiving, and taking the profits thereof, as the said defendant hath in his said plea lastly above pleaded alleged; and this, &c.; wherefore, &c.

De injuria, &c.

Traverse of right of way.

F. Buller.

The Rejoinder commonly takes issue on the traverse of this public right, and if there be a new assignment the plea is not guilty. See other precedents, 9 Wentw. Index, lxi.

Plea of right of way by *prescription*.

First plea—General Issue.

Second plea. After enumerating the trespasses, &c., proceed thus:

2 Chit. p. 621.

And the said *C. D.* further saith, that he the said *C. D.* long before and at the said several times, when, &c. was and still is seised in his demesne as of fee, of and in a certain close, called , contiguous and next adjoining to the said close, in which, &c. and that he the said *C. D.* and all those whose estate he now hath, and at the said several times when, &c. had of and in the said close called from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said *C. D.* at the said times, when, &c. of right ought to have had and used, and still of right ought to have and use, a certain way for himself and themselves, and his and their servants, farmers and tenants, occupiers of the said close called ——, to pass and repass on foot and with horses, mares, geldings, and other cattle, from a certain common king's highway, in the parish of aforesaid, into, through, over, and along the said close of the said *A. B.* called , in which, &c. unto and into the said close now of the said *C. D.* and so from thence back again, unto, into, through and over and along the said close of the said *A. B.* called , in which, &c. unto and into the said common king's highway, at all times of the year, at his and their free will and pleasure, as to the said close of the said *C. D.* with the appurtenances belonging and appertaining. And the

Private way by prescription by a freeholder.

said *C. D.* being so seised of his said close, and also being in the possession thereof, and having occasion to use the said way, did, with his servants and horses, and mares, and geldings, and carriages, at the said several times, when, &c. pass and repass, in, by, through and along the said way from the said common king's highway, into, through, over, and along the said close of the said *A. B.* called , in which, &c. unto and into the said close now of the said *C. D.* and so from thence back again, in, by, through, and along the said way, unto and into the said common king's highway, using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid, and in so doing, &c.

Justify the trespasses mentioned in the introductory part of the plea.

See other precedents, 9 Wentw. Index lvii. lxiii. 3 Ld. Raym. 86, &c.

Replication and new assignment, that the trespass was committed otherwise than in using the way. De injuriâ. Traverse of the right of Way. 9 Wentw. 243.

Plea of the prescriptive right when defendant has closes on both sides of the way. 3 Chit. 545.

Plea of Right of Way by a Copyholder.

See Chit. on Pleading, Vol. II. p. 623.

Plea of Right of a Way by non-existing Grant.

First plea—General Issue.

Second plea—Prescriptive Right.

Third plea. 2 Chit. p. 624.

Right of way by non-existing grant.

And for a further plea in this behalf, as to the said several supposed trespasses in the introductory part of the said second plea mentioned, and therein justified, the said *C. D.* by like leave, &c. says, (*actio non, as ante*, 470, *fourth precedent*,) because he says that he the said *C. D.* long before and at the said several times, when, &c. was and from thence hitherto hath been and still is seised in his demesne as of fee of and in the occupation of a certain close, situate, lying, and being in the parish of aforesaid; and the said *C. D.* further saith, that long before any of the said several times, when, &c. to wit, on, &c. at, &c. aforesaid, by a certain deed made between *I. K.* the then owner of the said close, in which, &c. and who was then seised thereof in his demesne as of fee, and *L. M.* who was then seised in his demesne as of fee of the said close, now of the said *C. D.* and whose estate therein he the said *C. D.* now hath, but which deed hath since been lost and destroyed by accident, and therefore cannot be brought into the said court here, and the date whereof is for that reason wholly unknown to the said *C. D.*, the said *I. K.* so then being owner of the said close, in which, &c. did grant to the said *L. M.* so then being the owner of the said close now of the said *C. D.* and to the heirs and assigns of the said *L. M.* a certain way from a certain public king's highway, in the parish aforesaid, into, through, over, and along the

said close, in which, &c. unto and into the said close now of the said *C. D.* and so back again from the said last-mentioned close, into, through, over, and along the said close, in which, &c. unto and into the said public king's highway, to go, return, pass and repass on foot by himself, and themselves, and his and their servants, and with horses, mares, and geldings, carts and carriages, in and along the said last-mentioned way, every year, and at all times of the year, at his and their free will and pleasure. By virtue of which said grant, the said *C. D.* before and at the said several times when, &c. was and still is entitled to such way as last aforesaid; and the said *C. D.* being so seised and entitled to such way as last aforesaid, he the said *C. D.* at the said several times when, &c. having occasion to use the said way, did with his servants, and with his said horses, mares and geldings, carts and carriages, at the said several times when, &c. go, pass, and repass, in, by, through, and along the said way from the said common king's highway, into, through, over, and along the said close of the said *A. B.* in which, &c. unto and into the said close now of the said *C. D.* and so from thence back again, in, by, through, and along the said way, unto and into the said common king's highway, using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid, and in so doing, &c.

Justify the trespasses mentioned in the introductory part of the plea.

Plea of Right of Way from Necessity.

The safest mode of pleading this right is as a way by a non-existing grant.

See 9 Wentw. Index, lviii. lxv.

The like by Grant.

See 9 Wentw. Index, lvi. lxii.

The like by Custom.

See 9 Wentw. Index, lxv.

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See Chit. Vol. II. p. 627.

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See Chit. Vol. III. p. 550.

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THE END.

G. Woodfall, Printer, Angel Court, Skinner Street, London.

By the same Author,

A TREATISE

ON

THE LAW

OF

RIGHTS CONNECTED WITH

WATER,

INCLUDING

RIGHTS IN THE SEA, AND IN NAVIGABLE RIVERS;
RIGHTS OF CANAL AND OTHER SUCH COMPANIES;
FISHERIES, WATERCOURSES, AND MILLS:

TOGETHER WITH

THE LAW OF SEWERS:

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